TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 569. 209. 18.

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER AND TIMBER COMPANY, APPELLANTS,

vs.

B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, COPARTNERS AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 20, 1896.

(16,348.)

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(16,348.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 31, 1896.

1 & 2 In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; Riordan Mercantile Company, a Corporation, and Arizona Lumber & Timber Company, a Corporation, Appellants,
vs.
B. N. FREEMAN, F. L. KIMBALL, and J. H. Hoskins, Jr. (a Copartnership, Doing Business under the Firm Name of the Arizona Central Bank), and John Vories, Appellees.
} Number —. Transcript.

Herndon & Norris, attorneys for Northwestern National bank.
E. E. Ellinwood, attorney for Riordan Mercantile Company and Arizona Lumber & Timber Company.
H. D. Ross and C. E. & F. Herrington, attorneys for Arizona Central bank.
H. Z. Zuck and E. S. Clark, attorneys for John Vories.

Filed ——, 189–, at — o'clock — m.

—— ——, *Clerk.*

3 The above-named plaintiffs for amended complaint allege—

That plaintiffs now are and at all times hereinafter mentioned were a copartnership, doing and transacting a general banking business in the county of Coconino, Territory of Arizona, under the firm name and style of the Arizona Central bank, and during all the times hereinafter mentioned had filed their certificate of copartnership in accordance with the laws of said Territory, which certificate still remains of record in the said county of Coconino; that the Arizona Lumber & Timber Company and the Riordan Mercantile now are and at all times hereinafter mentioned were corporations incorporated under the laws of the Territory of Arizona and doing and transacting business in Coconino county thereof; that the Northwestern National Bank of Chicago is a corporation, and at all times hereinafter mentioned was a corporation organized and existing under the laws of the United States; that John Vories is a resident of the said county of Coconino, and that said J. J. Donahue is also a resident of said county and is sheriff thereof.

II.

That the said defendant, Harry Fulton, was indebted to plaintiff copartnership on the 10th day of July, 1890, in the sum of about $7,500.00, and on said date executed and delivered to the said plaintiffs his promissory note in evidence of said indebtedness in words and figures as follows, to wit:

4 $7,500.00. FLAGSTAFF, ARIZONA, *July 10th*, 1890.

One year after date I, as principal, without grace, for value received, promise to pay to the order of the Arizona Central bank, at Flagstaff, Arizona, seven thousand five hundred dollars in gold coin, with interest at one and one-half per cent. per month from date until paid, and in the event of suit by the legal holder thereof collection fees such as the court may deem reasonable, not to exceed twenty per cent., to be added to and become a part of the judgment thereupon rendered; secured by chattel mortgage. This note is collateral to other notes of H. Fulton.

(Signed) H. FULTON.

III.

Plaintiffs further allege that the said defendant, H. Fulton, to secure the indebtedness evidenced by said promissory note, did, on the 10th day of July, 1890, execute and deliver to the said plaintiffs a chattel mortgage, conveying to said plaintiffs by said chattel mortgage the following-described property, to wit: Twelve hundred lambs, marked, ewes with a hole in left ear and split in the right; wethers, hole in right ear and split in left ear; 1,600 ewes, marked, hole in left ear and split in right ear; twenty two hundred wethers, marked with a hole in right ear and a split in the left ear, making five thousand sheep in all, with the Fulton brand, ranging at and between the Rim ranch, two miles west of the A. & P. pump-house, south of Flagstaff, Arizona, and the Mountain ranch, in Fulton cañon, seven miles south of Mormon dairy, in Yavapai county, Arizona, in the summer time; ranging in the winter months in the vicinity of Cañon Diablo, Arizona, and the Little Colorado river; that the chattel mortgage provides that if default be made in the payment of the said indebtedness,
5 then the said mortgagees, their agents or assigns, were and are authorized to proceed to sell the said mortgaged property at public auction from the front door of the post-office in the said town of Flagstaff, Arizona, after notice to be given by posting notices of such sale in three public places in the said town of Flagstaff fifteen days prior to the date of sale, and from the proceeds of such sale pay all the costs and expenses thereof, including counsel fees at five per cent., paying the whole of the indebtedness hereby secured, rendering the surplus, if any, to the mortgagor or his assigns, and that said sale might be made without gathering the sheep; which said chattel mortgage was duly executed in accordance with the laws of the Territory of Arizona and filed and recorded at the office of the recorder of the said county of Yavapai on the 16th day of July, 1890, as likewise required by law, a copy of which said chattel mortgage, containing also a copy of said promissory note, plaintiff- files herewith, marked Exhibit "A," and asks that the same be made a part of this complaint.

III½.

Plaintiffs further allege that after the execution of the said mortgage designated as Exhibit "A" by defendant Fulton to these plain-

tiffs, and in consideration of plaintiffs allowing certain numbers of sheep covered thereby, and upon which said mortgage was a lien, to be sold and disposed of, said defendant, Fulton, agreed with plaintiffs that for all sheep sold or disposed of there should be
6 substituted for those sold or disposed of and those lost by accident or death other sheep arising from the increase of said mortgaged sheep by their bearing lambs, and that at all times said Fulton should keep on hand at least five thousand sheep subject to and covered by said mortgage and upon which their said mortgage should cover and constitute a lien under the same terms mentioned in said mortgage, and at all times there should be at least five thousand sheep upon which their said mortgage should constitute a first lien, and as to all of the said facts and the said agreement the said defendants and each of them had due notice and knowledge during the entire year of 1892 and up to and including Jan'y 3rd, 1893, and ever since said date.

IV.

That there is still due upon the said note and indebtedness the sum of seven thousand five hundred and forty dollars, and that said note and mortgage are now the property of these plaintiffs, and demand thereon has been duly made of the defendant Harry Fulton, who has not paid the same.

V.

Plaintiffs further allege that thereafter, on the 12th day of July, 1890, the said defendant, Harry Fulton, likewise executed and delivered to the defendant John Vories a chattel mortgage upon one thousand head of sheep, described as follows, to wit:
7 Wethers and dry ewes to the number of one thousand, the wethers marked with a split in the left ear and a hole in the right ear; ewes marked with a hole in the left ear and a split in the right ear, ranging from May to November at and between the Rim ranch, two miles west of the A. & P. pump-house, south of Flagstaff, Arizona, and the Mountain ranch in Fulton cañon, seven miles south of Mormon dairy, in Yavapai county; ranging from November to May at and around Cañon Diablo, Arizona, and the Little Colorado river; which said chattel mortgage was executed and delivered to the said defendant, John Vories, by the defendant Harry Fulton, a copy of which said chattel-mortgage plaintiffs files herewith and asks that the same be made a part of this complaint, marked Exhibit "B."

VI½.

These plaintiffs further allege that upon, to wit, the 3d day of January, 1893, and before the execution of the mortgage herein designated as Exhibit "C," the said defendant, Fulton, had made default in the payment of the mortgage indebtedness mentioned in mortgage herein designated as Exhibit "A," and on the said day the said defendants, The Arizona Lumber & Timber Company and

Fulton, and these plaintiffs agreed among themselves and each with the other as follows, to wit:

That in consideration that these plaintiffs should release the "wool clip" for the year 1893 upon the sheep covered by said mortgage and upon which defendant Fulton had made default to
8 the said defendant, The Arizona Lumber & Timber Company, which wool clip was of the value of at least $3,000.00, and the further consideration that the said plaintiffs should extend their said mortgage indebtedness and take no immediate steps to collect said indebtedness, at that time due, and should give their consent that said defendant, Fulton, execute a mortgage upon his interest in the said sheep covered by plaintiffs' said mortgage and those substituted as aforesaid for such as had been disposed of to the said defendant, The Arizona Lumber & Timber Company, then the said plaintiffs' mortgage (designated herein as Exhibit "A") should constitute a prior lien and be a prior mortgage upon five thousand out of all the sheep in which the said defendant, Fulton, upon the said 3rd day of January had any interest or was the owner and upon which he was about to execute a mortgage to the said defendant, The Arizona Lumber & Timber Company, and plaintiffs' said mortgage should be a prior lien and a prior mortgage on five thousand sheep out of those mentioned in said mortgage about to be executed as aforesaid; that in pursuance and by virtue of said agreement the said mortgage about to be executed as aforesaid and herein designated as Exhibit "C" was on the 4th day of January, 1893, executed by and with the consent of these plaintiffs. Said defendant, Fulton, and the Arizona Lumber & Timber Company further agreed for the above-mentioned consideration that so long as plaintiffs' indebtedness, secured by their said mortgage
9 upon the said five thousand sheep, should remain unpaid they would keep at least five thousand sheep, upon which plaintiffs' said mortgage should be and constitute a prior lien to any incumbrance taken from said defendant, Fulton, by the said defendant, The Arizona Lumber & Timber Company, and that in no event should either of the said defendants dispose of or cause to be disposed of or in any manner incumber or cause to be incumbered any of the said sheep which would reduce the number to less than five thousand sheep, covered by plaintiffs' said mortgage; that in pursuance and by virtue of said agreement plaintiffs released the said wool clip for the year 1893, took no steps toward the collection of their indebtedness secured by their said mortgage until the commencement of this action, and consented to the execution of the mortgage designated Exhibit "C."

5½*a*.

That the plaintiffs further allege that on the 3rd day of January, 1893, the said defendants, Riordan Mercantile Company and Arizona Lumber & Timber Company, agreed to and with these plaintiffs that in consideration of the plaintiffs releasing the wool for the year 1893 to them and other good and valuable considerations that for any advancement or credit thereafter to be given to the said de-

fendant, Fulton, that plaintiffs' said mortgage should — and continue to be a prior lien upon 5,000 sheep in which said Fulton had on that day any interest to any lien or right by them or either of them thereafter taken or acquired.

Plaintiffs further allege that in all transactions relative to making the above agreement and contract one F. W. Sisson acted for and on behalf of the defendants Riordan Mercantile Company and Arizona Lumber & Timber Co. as officer and agent of both said defendant companies, and that he represented, as such officer and agent, to the plaintiffs that their said mortgage should be kept good, and that neither of said companies should do or cause to be done any act or thing to in anywise impair the lien of plaintiffs upon said sheep; that thereafter the defendant Riordan Mercantile Co. gave to defendant Fulton credit, and that on the 18th day of December, 1893, said credit amounted to the sum of $810.00; that defendant Fulton theretofore, to wit, on the 30th day of August, 1893, had paid in to the said Riordan Mercantile Company the sum of $1,000.00, with instructions to the Riordan Mercantile Company to apply it upon his open account with it; that defendant Riordan Mercantile Company, regardless of said instructions from said Fulton and without authority from him, applied the said $1,000.00 as a payment upon his certain note executed to the Arizona Lumber & Timber Co. and dated on the 30th day of August, 1893, long before the same was due, to wit, on the 30th day of August, 1893, and for the sole purpose of defeating and impairing the plaintiffs' lien by bringing attachment suit hereinafter set forth.

The plaintiffs further allege that the defendant Riordan Mercantile Co., in total disregard of its agreement with the plaintiffs, as above set forth, on the said 18th day of December, 1893, instituted suit upon said $810 open account of Fulton in the above-entitled court against said Fulton and caused to be issued from said court a writ of attachment, which said attachment defendant Sheriff J. J. Donahue executed under the instructions and directions of defendant Riordan Mercantile Co. by levying upon the said sheep described in paragraph XI of this complaint; that thereafter, on the 16th day of March, 1893, judgment was entered in said cause in favor of the defendant Riordan Mercantile Co. for the sum of $810.00 upon the default of defendant Fulton and a decree of foreclosure and order of sale was made, and on the 31st day of March, 1894, said sheep were sold by said defendant sheriff and bid in by said Riordan Mercantile Co. for the sum of $100.00.

That in all of the above-mentioned transactions the said F. W. Sisson, as officer and agent of said defendant companies, represented that the interests of said companies in relation to said transactions were the same, and that any contract made with one of said companies would be equally binding upon the other, which representations were relied upon by plaintiffs at the time of entering into said agreement; that by a known and previous course of dealings between said Fulton and the said companies the said Fulton had executed his note, payable to the order of the Arizona Lumber &

Timber Co., for future advances, and in drawing for said advances had, under the instructions of the said F. W. Sisson, drawn his drafts upon the Riordan Mercantile Co.

11 VI.

That plaintiffs further allege that thereafter said defendant, Harry Fulton, executed and delivered to defendant Arizona Lumber & Timber Co. a chattel mortgage among other things upon the sheep described in the aforesaid chattel mortgages to plaintiffs and the said defendant, John Vories, describing said sheep as follows, to wit:

About three thousand ewes, one thousand wethers, and two thousand lambs, the same being all the sheep now owned by mortgagor, and including all the wool and increase which may be produced by said sheep, all running on their accustomed range in Coconino county, marked, ewes, split in right ear and hole in left, and which said last-mentioned chattel mortgage in favor of said defendant, Arizona Lumber & Timber Co., was executed subject to the mortgages in favor of the plaintiffs and the said John Vories, and expressly recognized in the body and context thereof the validity of said last-mentioned mortgages in the following language, to wit:

"This being subject to a mtg. on (5,000) five thousand of above sheep to Arizona Central bank & (1,000) one thousand head & the residence property to John Vories; said number as described in mtgs. to be kept good out of increase;" a copy of which said last-mentioned mortgage to the Arizona Lumber & Timber Co. plaintiffs file herewith and make the same a part of the complaint, marked Exhibit "C."

12 VII.

Plaintiffs further allege that the said defendant, Arizona Lumber & Timber Company, likewise recognized the validity of the indebtedness due to plaintiffs from the said defendant, Harry Fulton, and likewise the validity of the chattel mortgage to secure said indebtedness, as hereinbefore alleged, by another paper in writing in words and figures as follows, to wit:

JANUARY 3D, 1893.

We hereby acknowledge notice of the existence of notes to the amount of forty-eight hundred dollars, secured by mortgage on sheep of Fulton, as set forth in said mortgage.

(Signed) ARIZONA LUMBER & TIMBER COMPANY,
By F. W. SISSON, *Treasurer.*

A copy of which plaintiffs herewith files and asks that the same be made a part of this complaint, marked Exhibit "D."

VIII.

Plaintiffs further allege that the said Arizona Lumber & Timber Company, with full knowledge of the indebtedness due to plaintiffs

and of the mortgage securing the same and knowing full well that its mortgage was subject to the mortgage in favor of plaintiffs by reason of the recognition of the same in the last-named mortgage to it, said defendant, Arizona Lumber & Timber Company, and for the purpose of defrauding plaintiffs and evading the recognition of the said indebtedness and said mortgage, procured the said defendant, Harry Fulton, to execute and deliver to it, the said Arizona Lumber & Timber Company, another chattel mortgage, dated on the 30th day of August, 1893, and *and* procured the said last-mentioned
13 chattel mortgage to be filed for record in the county of Coconino, Territory of Arizona, for the purpose of making the same a lien upon the sheep described in plaintiffs' said mortgage and for the purpose of thereby defrauding the plaintiff- out of *its* lien upon said sheep, pretending and claiming that the description in plaintiffs' mortgage was so defective as to render the said mortgage invalid, except for the recognition of the validity thereof in the mortgage and other instrument heremb efore referred to as executed by the said Arizona Lumber & Timber Company, marked Exhibits "C" and "D;" which said last-mentioned mortgage to the said Arizona Lumber & Timber Company plaintiff- files herewith and asks that the same *to* be made a part of this complaint, marked Exhibit "E."

IX.

Plaintiffs allege that no new indebtedness was created as a consideration for the last-mentioned mortgage, and that the same was given for the indebtedness already existing and owing from the said Fulton to the said Arizona Lumber & Timber Company, for which the first mortgage to the said last-mentioned company was executed by said Fulton, a copy of which is filed herewith, marked Exhibit "C," but said last-mentioned mortgage was executed as security for the renewal of said indebtedness.

X.

That plaintiffs further allege that for the purpose of evading the priority of the lien of plaintiffs' said mortgage over that of the Arizona Lumber & Timber Company the said last-mentioned defendant has transferred and assigned by endorsement the
14 said promissory note secured by said last-mentioned chattel mortgage, dated August 30th, 1893, for $6,000.00, payable ninety days after date to the said defendant, The Northwestern National Bank of Chicago, Illinois; and plaintiffs allege that it is not informed as to what consideration the said Northwestern National Bank of Chicago paid for said promissory note, but it charges upon information and belief the fact to be that the said Northwestern National bank advanced money or other valuable thing as a consideration for said note, but accepted the same in payment of prior indebtedness due and owing to it from said defendant, Arizona Lumber & Timber Company, and with full knowledge of this plaintiff's mortgage against said described sheep; that the reasonable market value of said sheep on the 17th day of September, 1893, was

two and $\frac{50}{100}$ dollars for wethers and for ewes and lambs two dollars.

The plaintiffs further allege that the defendant The Riordan Mercantile Company is composed of the same stockholders and has the same officers substantially as the defendant The Arizona Lumber & Timber Company, and that the said last-mentioned defendant, The Riordan Mercantile Company, has caused a writ of attachment to be issued out of the honorable district court in which this complaint is filed and placed the said writ in the hands of J. J. Donahue, sheriff of the county of Coconino, and that the said sheriff, under the direction of the said defendant, The Riordan Mercantile Company, has caused said writ to be levied upon sheep described in the plaintiffs' mortgage, to wit:

Upon 2,926 ewe sheep, marked hole in left ear, split in right ear; 900 head wether sheep, marked hole in right ear and split in left ear; 1,287 lambs, ewe lambs marked hole in left ear, split in right ear, wether lambs marked hole in right ear, split in left ear; 118 rams; but plaintiffs allege the said defendants, The Riordan Mercantile Company, and the said J. J. Donahue, defendant, sheriff of said Coconino county, had full, complete, and actual knowledge of plaintiffs' mortgage and of the fact that the said sheep so seized and levied upon under and by virtue of said writ of attachment were included in plaintiffs' said mortgage.

XII.

Plaintiffs further allege that the said levy and seizure was therefore illegal; and the plaintiffs further allege that the said sheriff is unlawfully and without right in possession of said sheep.

XIII.

Plaintiffs further allege that since the execution of the said mortgage by said defendant, Fulton, to the plaintiffs the county of Coconino has been established, and that the said sheep are now and have been ever since the establishment of the said county in the said county of Coconino, being in that part of the former county of Yavapai taken for the purpose of organizing the said county of Coconino.

16 XIV.

Plaintiffs further allege that the said Arizona Lumber & Timber Company is perfectly solvent, and that the amount of the indebtedness assigned by it to the said Northwestern National Bank of the City of Chicago, Illinois, by endorsement or otherwise, for which said mortgage marked Exhibit "E" was given, can be easily recovered by a personal suit against the said defendant, The Arizona Lumber & Timber Company; and plaintiffs further allege that the said defendant, Harry Fulton, is wholly insolvent, and it, the said plaintiff, must look to its mortgage security alone for the payment of its said indebtedness.

XV.

That all the sheep and personal property upon which plaintiffs' mortgage is a lien are situated within the said county of Coconino.

Wherefore plaintiffs pray—

1. That the said defendants, Harry Fulton, The Arizona Lumber & Timber Company, The Riordan Mercantile Company, The Northwestern National Bank of the City of Chicago, Illinois; John Vories, and J. J. Donahue, sheriff of the county of Coconino, Arizona, may be made parties defendant to this complaint and required to answer the same, and that the said plaintiffs may have judgment for the possession of said sheep under the terms of their said mortgage; and

2. That both of said mortgages in favor of the Arizona Lumber & Timber Company and any rights claimed and set up under the last-mentioned mortgage in favor of the said Arizona
17 Lumber & Timber Company by the said Northwestern National Bank of Chicago shall be held subsequent to and subject to the rights of plaintiffs under *its* said mortgage; and

4. That if it should be determined that the said defendant, The Northwestern National Bank of Chicago, is a *bona fide* holder of the indebtedness secured by said mortgage without notice and is entitled to enforce said mortgage as a prior lien upon said sheep to the mortgage of the plaintiffs, that then the said Northwestern National Bank of Chicago be decreed and compelled to proceed against the said Arizona Lumber & Timber Company personally and exhaust its remedy against the said defendant corporation personally before it shall be permitted to subject the said mortgaged property to the satisfaction of the said mortgage indebtedness, or that plaintiffs have judgment against the defendant The Arizona Lumber & Timber Company for the amount of *its* said indebtedness against said defendant, H. Fulton.

6. Plaintiffs further pray that said mortgage may be foreclosed and said property described therein sold under decree of this court for the satisfaction of *its* said mortgage and for distribution under such decree and disposition thereof as the court may make.

7. And plaintiffs further pray that a receiver may be appointed to take possession of the said property and to hold the same or make such disposition thereof as by decree this court may order and direct, and that plaintiffs may have such other and further relief as *it* may require and to the court shall seem meet; and thus your plaintiffs will ever pray.

18 TERRITORY OF ARIZONA, } *ss:*
County of Coconino, }

J. H. Hoskins, Jr., being first duly sworn, deposes and says that he is cashier of The Arizona Central Bank, plaintiffs herein; that he has read the foregoing amended complaint of plaintiffs; that he knows of his own personal knowledge that the things therein set

forth are correct and true except those things stated on information and belief, and as to those he verily believes them to be true.

J. H. HOSKINS, JR.

Subscribed and sworn to before me this 21st day of July, A. D. 1894.

J. GUTHRIE SAVAGE,
Notary Public, Coconino County.

EXHIBIT "A."

Harry Fulton
to
Arizona Central Bank.

Chattel Mortgage.

Know all men by these presents: that Harry Fulton, a sheep-grower of the town of Flagstaff, county of Yavapai, Territory of Arizona, mortgagor, does hereby mortgage unto the Arizona Central Bank of the Town of Flagstaff, county of Yavapai and Territory of Arizona, mortgagee, all that certain personal property situated and described, as follows, to wit:

Twelve hundred (1,200) lambs, marked, ewes with hole in left ear and split in right, wethers hole in right ear and split in left
19 ear. Sixteen hundred (1,600) ewes, marked, hole in left ear and split in right ear. Twenty-two hundred (2200) wethers marked, with hole in right ear and split in left ear, making five thousand sheep, in all with the Fulton brand, ranging at and between the Rim ranch, two miles west of the A. & P. pump-house, south of Flagstaff, Arizona, and the Mountain ranch in Fulton cañon, seven miles south of the Mormon dairy in Yavapai county, Arizona, in the summer time. Ranging in the winter months in the vicinity of Cañon Diablo, Arizona, and the Little Colorado river.

To have and to hold the same unto the said mortgagees and to their legal representatives and assigns forever.

And said mortgagor, for himself, his heirs and assigns hereby covenants to and with said mortgagees, their legal representatives and assigns, that he is lawfully possesses of said property as of his own personal estate, that the same is unincumbered and that he and his heirs and assigns will warrant and defend the same to the said mortgagees and to their legal representatives and assigns against the claims of all persons as security for the sum of seventy-five hundred dollars, with interest at 1½ per cent. per month, the payment of the sum of money at the time and place and at the rate of interest as specified in a certain promissory note of even date herewith and in the words and figures following to wit:

$7,500.00. FLAGSTAFF, ARIZONA, *July 10th*, 1890.

One year after date, I, as principal, without grace, for value received, promise to pay to the order of the Arizona Central bank,

Flagstaff, Arizona, seventy-five hundred dollars, in gold coin
20 with interest at one and one-half per cent. per month, from date until paid. In event of suit by the legal holder hereof, collection fees such as the court may deem reasonable, not to exceed 20 per cent., to be added to and become a part of the judgment hereupon rendered. Secured by chat. mtg. (This note is a collateral to other notes of H. Fulton.)

(Signed) H. FULTON.

And these presents shall be void if such payment be made, but if default be made in the payment thereof, then the said mortgagees their agents or assigns are hereby authorized to proceed to sell the said mortgaged property, at public auction from the front door of the post-office, in said town of Flagstaff, Yavapai county, Arizona, after notice to be given by posting notices of such sale in three public places of said town of Flagstaff, Arizona, fifteen days prior to the date of sale, and from the proceeds of such sale to pay all the costs and expenses thereof, including counsel fees at five per cent., paying the whole of the indebtedness hereby, secured rendering the overplus if any, to the mortgagor or his assigns, and said sale may be made without gathering the sheep.

It is hereby provided further, that if before said debt hereby secured and payable, becomes due, said mortgagor shall remove said property, or suffer the same to be done, from said county, or shall sue the same or suffer it to be done, or shall attempt so to do, or to in anywise make away with the same, or suffer it to be done, so that in anywise the security herein provided shall become in anywise impaired, then and in that event, said debt and every part thereof shall become due and payable, and said mortgagees, their
21 legal representatives or assigns are hereby empowered to at once proceed to sell this property as above provided for in default of payment.

And the mortgagees, or party crying the sale, are hereby constituted, authorized and empowered, the agents of the mortgagor for him and in his name, place and stead to make, execute and acknowledge a good and sufficient bill of sale, conveying property above described to purchaser, which same bill of sale shall have all the force as if executed in mortgagor's own proper person, and shall be competent authority in the hands of legal holder thereof to ask for, demand, sue for, and receive the possession of the property with complete title thereto.

Witness my hand, this 10th day of July, A. D. 1890.

HARRY FULTON.

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

Harry Fulton, the mortgagor within named, and J. H. Hoskins, Jr., cashier and manager of and partner in the Arizona Central bank, the mortgagee within named, and for said mortgagee bank, being first duly sworn, each for himself and not one for the other,

does depose and say that the foregoing mortgage is *bona fide* and made without any design to delay or defraud creditors.

HARRY FULTON.
J. H. HOSKINS, JR.

Subscribed and sworn to before me this 10th day of July, A. D. 1890.

[L. S.] W. L. VAN HORN,
Notary Public.

Filed and entered, at the request of J. H. Hoskins, Jr., at
22 50 minutes past 12 o'clock p. m., on the 16th day of July, A. D. 1890, in Book 3 of Chattle Mortgages, pages 246 and 247, of the County of Yavapai, Territory of Arizona.

[L. S.] CHARLES H. AKERS,
County Recorder.
By J. M. AITKEN,
Deputy Recorder.

23 EXHIBIT "B."

Chattel Mortgage.

Know all men by these presents: That Harry Fulton a sheep-grower of the town of Flagstaff, county of Yavapai, Territory of Arizona, mortgagor, does hereby mortgage unto John Vories, of the town of Flagstaff, county of Yavapai, Territory of Arizona, mortgagee, all that certain personal property situated and described as follows, to wit:

Wethers and dry ewes to the number of one thousand—the wethers marked with a split in the left ear and a hole in the right—ewes marked with a hole in the left ear and a split in the right—ranging from May to November at and between the Rim ranch, two miles west of the A. & P. pump-house, south of Flagstaff, Arizona, and the Mountain ranch, in Fulton cañon, seven miles south of Mormon dairy, in Yavapai county; ranging from November to May at and around Cañon Diablo, Arizona, and the Little Colorado river.

To have and to hold the same: unto the said mortgagee and to his heirs and assigns forever.

And said mortgagor for himself, his heirs, and assigns, hereby covenants to and with said mortgagee, his heirs and assigns that he is lawfully possessed of said property as of his own personal estate, that the same is unincumbered, and that he and his heirs and assigns will warrant and defend the same to the said mortgagee, and to his heirs and assigns against the claims of all persons, as security for the sum of four thousand dollars, with interest at 1½ per cent., the payment of the sum of money at the time and
24 place and at the rate of interest as specified in a certain promissory note of even date herewith and in the words and figures following, to wit:

$4,000.00. FLAGSTAFF, ARIZONA, *July 10th*, 1890.

Ninety days after date, I as principal, without grace, for value received, promise to pay to the order of Jno. Vories at the Arizona Central bank, Flagstaff, Arizona, four thousand dollars, in gold coin, with interest at one and one-half per cent. per mo. from date until paid. And in event of suit by the legal holder hereof collection fees of 10 per cent. to be added and become a part of the judgment hereupon rendered. Secured by chattel and real mortgage.

(Signed) HARRY FULTON.

And these presents shall be void if such payment be made, but if default be made in the payment thereof, then the said mortgagee, his agents or assigns, are hereby authorized to proceed to sell the said mortgaged property at public auction, from the front door of the post-office, in said town of Flagstaff, after notice to be given by posting notices of such sale in three public places of said town of Flagstaff, fifteen days prior to the date of sale, and from the proceeds of such sale, to pay all the costs and expenses thereof, including counsel fees of ten per cent., paying the whole of the indebtedness hereby secured, rendering the overplus if any, to the mortgagor or his assigns. It is hereby provided further, that if, before said debt hereby secured and payable, becomes due, said mortgagor shall remove said property, or suffer the same to be done, from said county or shall sell the same, or suffer it to be done, or shall attempt so to do, or to in anywise make away with the same or suffer it to be done, so that in anywise the security herein provided shall become in anywise impaired, then and in that event said debt and every part thereof shall become due and payable and said mortgagee, his heirs, legal representatives or assigns are hereby empowered to at once proceed to sell this property as above provided for in default of payment.

And the mortgagee or party crying the sale is hereby constituted, authorized and empowered the agent of the mortgagor, for him and in his name, place and stead, to make, execute and acknowledge a good and sufficient bill of sale, conveying the property above described to purchaser, which said bill of sale shall have all the force as if executed in his own proper person, and shall be competent authority, in the hands of the legal holder thereof, to ask for, demand, sue for and receive the possession of the property with complete title thereto.

Witness my hand and seal this — day of July, A. D. 1890.

HARRY FULTON.

TERRITORY OF ARIZONA, }
County of Yavapai, } ss:

Harry Fulton, the mortgagor within named, and John Vories, the mortgagee within named, being first duly sworn, each for himself and not one for the other, does depose and say that the fore-

going mortgage is *bona fide* and made without any design to defraud or delay creditors.

HARRY FULTON.

Subscribed and sworn to before me this 12th day of July, A. D. 1890.

[SEAL.] J. H. HOSKINS, JR.,
Notary Public.

26 Endorsed: Filed and entered, at the request of Jno. Vories, at 12 o'clock *a.* m., on the 5th day of January, A. D. 1893, in Book 1 of the Chattel Mortgages, at page 102, records of the county of Coconino, Arizona Territory. (Seal.) C. A. Bush, county recorder.

EXHIBIT "C."

Mortgage.

This indenture made this 4th day of January, A. D. 1893, by Harry Fulton of the *twon* of Flagstaff, Coconino county, Arizona, mortgagor, to the Arizona Lumber & Timber Company, of the same place, mortgagee:

27 Witnesseth: That the said mortgagor mortgages to the said mortgagee all that real and personal property situated and described as follows, to wit:

The south — (S. ½) of the northeast quarter (N. W. ¼) of section twenty-four (24) township twenty (20), north, range six, east of the Gila and Salt River meridian; also lots thirteen (13) fourteen (14), fifteen (15), twenty-two (22), twenty-three (23), and twenty-four (24) of block nineteen (19) in the town of Flagstaff, Coconino county, Arizona; together with all the improvements thereon, and all the appurtenances thereunto belonging.

Also about three thousand ewes, one thousand wethers and two thousand lambs; same being all the sheep now owned by mortgagor and including all the wool and increase which may be produced by said sheep; all running on their accustomed range in Coconino county, marked, ewes, split in right ear, hole in left; wethers, reverse. This being subject to a mortgage on five thousand of above sheep to Arizona Central bank and on one thousand head and the residence property to Jno. Vories. Said number as described in mtgs. to be kept good out of increase.

Also twenty-five half-blood Shropshire rams, thirty-three Merino rams, two full-blood Shropshire rams, two farm wagons, one spring wagon, one buckboard, ten horses and three colts, branded "H" on left hip. Two sets double harness. As security for the payment to the mortgagee of the sum of eight thousand eight hundred

28 and eighty-five dollars ($8,885) in lawful money of the United States of America, six months from the date of a certain note given by said mortgagor to said mortgagee for a like amount, said note payable at the office of the mortgagee in Flagstaff, and bearing interest at one and one half per cent. per month from the date thereof, and being in words and figures as follows, to wit:

$8,885.00. FLAGSTAFF, ARIZONA, *Dec. 31st*, 1893.

Six months after date, without grace, I promise to pay to the Arizona Lumber & Timber Company, or order the sum of eight thousand, eight hundred and eighty-five dollars, for value received, with interest at the rate of one and one-half per cent. per month from date until paid. Principal and interest payable in current funds of the United States, at the office of the Arizona Lumber & Timber Co., Flagstaff, Arizona, without notice and protest. I hereby waive and relinquish all right to exemption of any property I may have from execution on this debt. I further agree if this note is collected by suit to pay ten per cent. of face for attorneys' fees.

(Signed) HARRY FULTON.

It is also hereby agreed that if the said mortgagor fails to make payments in said note provided, then the mortgagee, its representatives, successors or assigns, may take possession of said property, using all necessary force so to do, and after giving ten days' notice, by posting three notices, each in a public place in the town of Flagstaff, county and Territory aforesaid, may proceed to sell the same at public auction in front of the post-office in said town to the highest bidder for cash; and the said mortgagor does hereby empower the party crying such sale to make proper deed or bill of sale, transferring said property to the purchaser, which deed or bill of sale shall be complete authority in the hand of the purchaser
29 or his assigns to take possession of the property described herein, and shall be complete evidence of title thereto; and from the proceeds of such sale pay the whole amount in said note provided, and all costs of sale, including counsel fees, not exceeding ten per cent. of the face of said note, paying the surplus, if any, to the mortgagor.

It is further agreed if before the day upon which the paper hereby secured becomes due, the said mortgagor shall move any of the said property, or suffer the same to be moved from said county, or sell the same or suffer it to be done, or in anywise make way with the same or suffer it to be done, so that the security herein provided for becomes in anywise impaired, without permission in writing first obtained for the said mortgagee, then and in that event, said note and every part thereof shall become due and payable, and said mortgagee, its representative, successors or assigns, are hereby empowered to at once proceed to foreclose this mortgage as above provided, or to sell without foreclosure as above specified.

In witness whereof the said mortgagor has hereunto set his hand and seal this 4th day of January. A. D. 1893.

HARRY FULTON.

TERRITORY OF ARIZONA, } *ss*:
County of Coconino, }

Harry Fulton, mortgagor in the foregoing named, and F. W. Sisson, treasurer of the mortgagee, the latter acting for said
30 mortgagee, being each duly sworn, do*th* depose and say that

the said mortgage was made in good faith and without any design to hinder or delay or defraud creditors.

F. W. SISSON,
Treas. A. L. & T. Co.
HARRY FULTON.

Subscribed and sworn to before me this 4th day of January, A. D. 1893.

J. H. HOSKINS, JR.,
Notary Public.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Personally appeared before me, the *the* undersigned, a notary public in and for the county and Territory aforesaid, Harry Fulton, personally known to me to be the same person whose name is subscribed to the foregoing instrument as mortgagor therein, and duly acknowledged that he executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 4th day of January, A. D. 1893.

[SEAL.] J. H. HOSKINS, JR.,
Notary Public.

Endorsed: Recorded at request of F. W. Sisson Jan. 5th, A. D. 1893, at 12.15 p. m., in Book One of Real Mortgages, pages 475, 476, 477, 478, records of Coconina county, Arizona; also in Book of Chat. Mtgs., page 102, records of Coconino county, Arizona. (Seal.) C. A. Bush, county recorder.

31 *Chattel Mortgage.*

EXHIBIT "E."

Know all men by these presents: That the undersigned Harry Fulton, of Flagstaff, Coconino county, Arizona, party of the first part, in consideration of the sum of six thousand dollars ($6,000.00) to him in hand paid by Arizona Lumber & Timber Company of the same place, party of the second part, does hereby sell and transfer unto the said party of the second part; its successors or assigns, the following-described property, to wit:

About thirty-two hundred (3,200) ewes more or less; about thirteen hundred (1,300) wethers more or less; about fourteen hundred (1,400) lambs more or less; being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep; all running on their accustomed range in Coconino county, marked; ewes and ewe lambs, split in right ear and hole in left; wethers and wether lambs, reverse. Twenty-five (25) half-blood Shropshire rams; thirty-three XXX (33) Merino rams; two full-blood Dickenson Merino rams; one (1) full blood Shropshire ram; about sixty (60) ram lambs; two farm wagons,

one spring wagon, one buckboard; ten horses; and three colts branded "H" on left hip; two sets double harness.

Upon condition that said party of the first part pay to said party of the second part, its successors or assigns, the said sum of six thousand dollars, ($6,000.00) and interest according to the tenor of a certain promissory note, which said note is in words and figures as follows, to wit:

32 $6,000.00. FLAGSTAFF, ARIZONA, *Aug. 30th*, 1893.

90 days after date waiving grace, notice and protest, for value received, I promise to pay to Arizona Lumber & Timber Company or order, the sum of six thousand dollars, with interest thereon at the rate of one and one-half per cent. per month from date until paid. Principal and interest payable in gold coin of the United States of the present standard, at the office of the Arizona Lumber & Timber Company, Flagstaff, Arizona.

(Signed) HARRY FULTON.

Then this instrument shall be void, otherwise to remain in full force and effect. And in case default be made in the payment of said debt or any part thereof, or of the interest due thereon, when the same should be paid, then the whole sum shall at the election of the said party of the second part, its successors or assigns, become due and payable. The property hereby sold and conveyed is to remain in the possession of the said party of the first part, except in case of default in the payment of said debt or interest or some part thereof, or of sale or disposal of said property, or an attempt to sell or dispose of same, or some part thereof, or a removal or attempt to remove the same, from said Coconino county, or their usual range of location, or an unusual or unreasonable depreciation in the value thereof; the said party of the second part, its agents, successors or assigns may take said property or any part thereof, into its possession, and may use such force as is necessary so to do.

It is further agreed that said party of the second part shall not be required to take actual possession of the stock or other
33 property above described; but that in case of default or breach of any of the covenants or conditions of this instrument, the said property may be sold under the powers herein given, as it runs upon the range, or wherever it may be located at the time, and a good and sufficient bill of sale given the purchaser thereof, upon taking possession actual or constructive, of said property or any part thereof, either in case of default or as above provided, the said party of the second part, his agents, successors, assigns, or the legal holder of the note above described may proceed to sell the same or any part thereof at public auction for cash to the highest bidder in front of the jail, in the town of Flagstaff, county of Coconino, Territory of Arizona, having first given ten days' notice thereof by posting three written or printed notices of the same in at least three public places in said town of Flagstaff, and after satisfying the necessary costs, charges and expenses incurred

by the breach and sale, including ten per cent. counsel fees, and paying said debts and interest out of the proceeds of said sale, it shall pay over the surplus, if any, to the said party of the first part, his heirs or assigns.

It is further agreed that the said party of the second part its agents, successors or assigns making the above sale as specified may become purchasers at such sale without prejudice.

In witness whereof, said party of the first part has hereunto set his hand, this 30th day of August, A. D. 1893.

HARRY FULTON.

34 TERRITORY OF ARIZONA, } ss:
County of Coconino, }

Harry Fulton, mortgagor herein, and F. W. Sisson, treasurer and agent for the mortgagees, the latter acting for the said mortgagee, each for himself doth depose and say that this the above mortgage is *bona fide* and made without any design to defraud or delay creditors.

HARRY FULTON.
F. W. SISSON,
Treas. Arizona Lumber & Timber Co.

Subscribed and sworn to before me, in the county and Territory aforesaid, this 31st day of August, A. D. 1893.

[SEAL.] C. A. BUSH,
County Recorder.

Endorsed: Filed at request of F. W. Sisson Aug. 31st, A. D. 1893, at 11 o'clock a. m., in Book One of Chattel Mtgs., page 138, records of Coconino county, Arizona. (Seal.) C. A. Bush, county recorder.

EXHIBIT "D."

FLAGSTAFF, ARIZONA, *Jan. 3rd*, 1892.

We hereby acknowledge notice of existence of notes to the amount of forty-eight hundred dollars ($4,800.00), secured by mortgage on sheep of H. Fulton, as set forth in said mortgage, which mortgage is prior to our mortgage.

ARIZONA LUMBER & TIMBER COMPANY,
By F. W. SISSON, *Treas.*

(Endorsed:) Filed July 21st, 1894. Oscar Gibson, clerk.

35 Comes now the defendant Harry Fulton, by his attorney, E. E. Ellinwood, and denies each and every allegation set forth in the complaint of the plaintiff herein, specifically and generally.

The defendant Harry Fulton further alleges that the money demanded and sued for in paragraph II of plaintiff's complaint has been fully paid, satisfied, and discharged.

Wherefore said defendant, Harry Fulton, prays the judgment of the court that the indebtedness set forth in the plaintiff's complaint and the mortgage to The Arizona Central Bank, plaintiff herein, therein described, be discharged, satisfied, and cancelled, and for such further and other relief as may seem to the honorable court meet and proper, and for costs of suit in this behalf expended.

(Endorsed:) Filed this 12th day of April, 1894. Oscar Gibson, clerk. T. J. Moyer, deputy.

36 *Answer of J. J. Donahue.*

Comes now the defendant J. J. Donahue, by his attorney, E. E. Ellinwood, and disclaims any right, title, or interest in and to the property described in the plaintiff's complaint.

(Endorsed:) Filed this 12th day of April, 1894. Oscar Gibson, clerk. T. J. Moyer, deputy.

37 The above-named defendant, John Vories, for amended answer to plaintiff's complaint says:

I.

That he admits the allegations of paragraph I of the said complaint.

II.

Has no knowledge as to the matters alleged in paragraph II of the said complaint and therefore requires strict proof of the same.

III.

Admits the allegations of paragraph III of the said complaint, and as to the matters and things alleged in paragraphs III½ and IV this defendant has not full knowledge and therefore requires strict proof thereof.

IV.

Admits the allegations of paragraph V of the said complaint and avers that the said chattel mortgage upon 1,000 head of sheep was executed and delivered by said Harry Fulton to this defendant as security for the payment of a certain promissory note set out therein and in the words and figures following, to wit:

$4,000.00. FLAGSTAFF, ARIZONA, *July 10th*, 1890.

Ninety days after date I, as principal, without grace, for value received, promise to pay to the order of Jno. Vories, at the Arizona Central bank, Flagstaff, Arizona, four thousand dollars in gold coin, with interest at one and ½ per cent. per mo. from date until paid, and in event of suit by the legal holder hereof collection fees
38 of 10 per cent. to be added and become a part of the judgment hereupon rendered, secured by chattel and real mortgage.

(Signed) HARRY FULTON.

That by the terms of the said chattel mortgage it is further provided that if default be made in the payment of the said note, then the said mortgagee, his agents or assigns, are authorized to proceed to sell the said mortgaged property at public auction from the front door of the post-office in said town of Flagstaff after notice to be given by posting notices of such sale in three public places of said town of Flagstaff 15 days prior to the date of sale, and from the proceeds of such sale to pay all costs and expenses thereof, including counsel fees of 10 per cent., paying the whole of the indebtedness thereby secured, rendering the surplus, if any, to the mortgagor or his assigns; that the said chattel mortgage was duly executed according to the laws of Arizona Territory on the 12th day of July, 1890, and delivered to this defendant John Vories on the said date, and that the said chattel mortgage was duly filed and recorded in the office of the county recorder of Coconino county on the 5th day of January, A. D. 1893, a copy of which said chattel mortgage is hereto attached, filed herewith, marked "Exhibit A," and asked to be read as a part of this answer; that at the time of executing the said chattel mortgage and the mortgage to the plaintiffs the defendant Harry Fulton was the owner of and had in his possession the exact number of sheep covered by the said mortgages to this
39 defendant John Vories and the plaintiffs; that it was intended, understood, and agreed by and between the plaintiff, the defendant Harry Fulton, and the defendant John Vories at the time of the execution of the two mortgages aforesaid that the said mortgages constituted a prior lien upon all of the sheep of the defendant Harry Fulton, and it was further agreed, in consideration of the defendant John Vories allowing certain of said mortgaged sheep to be sold and disposed of, and in consideration of his releasing his right to the proceeds thereof, there were always and at all times to be kept by the defendant Harry Fulton and the plaintiffs herein 1,000 head of wethers and dry ewes subject to the said mortgage lien of the defendant John Vories.

V.

That there is now due and unpaid of the said indebtedness of defendant Harry Fulton to this defendant John Vories the sum of two thousand five hundred and fifty ($2,550.00) dollars, with interest thereon, at the rate of one and one-half per cent. per month from the fifth day of March, 1894; that the said note and mortgage are the property of this defendant John Vories, and that no part of the said balance has been paid, though payment thereof has been demanded from the defendant Harry Fulton and refused.

40 VI.

Defendant admits the allegations of paragraph V½ of plaintiffs' complaint, and alleges that upon the 3rd day of January, 1893, and before the execution of the mortgage designated as Plaintiffs' "Exhibit C," the defendant Harry Fulton had made default in the payment of the mortgage indebtedness to this defendant John Vories,

that on the said day the defendants Arizona Lumber & Timber Company, Harry Fulton, and John Vories entered into the following agreement among themselves, to wit:

That in consideration that this defendant should release the wool upon the 1,000 sheep covered by his said mortgage and his right to the proceeds of the sale of such wool for the year 1893 to the Arizona Lumber & Timber Company, and should forbear to foreclose his said mortgage and collect his said mortgage debt then due, and should consent that the defendant Harry Fulton execute a mortgage to the Arizona Lumber & Timber Company upon his interest in the said 1,000 sheep upon which the defendant John Vories then held a prior mortgage lien, that then the mortgage of this defendant John Vories should be considered to be a prior lien upon 1,000 of the wethers and dry ewes then owned by the defendant Harry Fulton, and that said defendants, Harry Fulton and The Arizona Lumber & Timber Company, would do nothing to anywise impair or lessen the said security of this defendant John Vories; that in pursuance of said agreement this defendant released his claim
41 to the wool growing upon said 1,000 wethers and dry ewes in the year 1893, took no steps toward the collection of said mortgage debt, and consented to the execution of the mortgage designated as Plaintiffs' "Exhibit C."

VI½.

Answering paragraph V½*a* of plaintiffs' amended complaint, this defendant John Vories does not deny the allegations therein contained, and avers that on the 2nd day of July, 1892, the defendant The Riordan Mercantile Company, through its treasurer and agent, F. W. Sisson, admitted to this defendant John Vories that the said Riordan Mercantile Company had before the 1st day of July, 1892, received actual notice of defendant John Vories' said mortgage on 1,000 head of wethers and dry ewes; that he, the said Sisson, for and on behalf of the defendant The Riordan Mercantile Company, then declared further that he recognized the said mortgage of defendant Vories as a lien prior and paramount to any mortgage or lien then held or thereafter in any manner to be acquired or taken by the Riordan Mercantile Co.; that, relying and depending on such declarations and the good faith thereof, this defendant forebore from foreclosing his said mortgage and from taking any steps toward the collection of his mortgage debt, in the payment of which default had theretofore been made by defendant Harry Fulton; that thereafter, on the 18th day of December, 1893, defendant The Riordan Mercantile Co., in violation and disregard of *their* said agreement and in fraud of rights expressly recognized by it of this
42 defendant John Vories, sued out of the above-entitled court a writ of attachment against the defendant Harry Fulton upon an open account of $810.00 and caused such writ to be levied upon all the sheep covered by this defendant's mortgage; that judgment was entered in said action in favor of said Riordan Mercantile Co. on the 16th day of March, 1894, and a decree of foreclosure and

sale was granted, under which decree the said sheep and all of the same were sold by the defendant J. J. Donahue as sheriff and bought in by the defendant The Riordan Mercantile Co. on the 31st day of March, 1894, for the sum of $100.00.

VII.

Defendant admits the allegations of paragraphs VI and VII of the said complaint, and in his own behalf realleges all and singular the matters and things set forth in said paragraph VI of the said complaint in the same manner and form.

VIII.

Defendant admits the allegations contained in paragraph VIII of the said complaint, and alleges each and every the matters and things therein alleged to have been done by the Arizona Lumber & Timber Co. to be true and to have been done for the purpose of defrauding this defendant John Vories as well as the plaintiffs, and that the Arizona Lumber & Timber Company made the same pretenses as to defectiveness of description in the mortgage of this defendant as it made in that of the plaintiffs.

43

IX.

Defendant John Vories admits the allegations of paragraphs IX and X of the said complaint, and realleges in the same manner and form each and every the allegations in the said paragraphs contained, and alleges that the said Northwestern National bank took the said note and mortgage with full knowledge of the mortgage lien of this defendant upon 1,000 wethers and dry ewes, being a part of the same sheep covered by the said mortgage so assigned to it.

X.

Defendant John Vories realleges the same manner and things in the same manner and form as are alleged by the plaintiffs in paragraph XI of their said complaint, and further avers that the said defendants, The Arizona Lumber & Timber Company, The Riordan Mercantile Co., and J. J. Donahue, had actual knowledge and notice that 1,000 of the sheep so attached, as alleged, were covered by the mortgage lien of this defendant and were the same sheep upon which the defendant John Vories holds a mortgage lien.

XI.

Defendant John Vories further alleges that the said sheep as levied upon have since been sold under a decree of foreclosure of this court, and that the said sheep were bought at such sale by the defendant The Riordan Mercantile Company with full knowledge of the mortgage lien of this defendant upon 1,000 head
44 thereof; that before such sale and after such attachment this defendant demanded of the defendant The Riordan Mer-

cantile Co. possession of 1,000 wethers and dry ewes of the said sheep by virtue of his said mortgage and the terms thereof, which demand was refused.

XII.

Defendant John Vories realleges the same matters and things in the same manner and form as are alleged in paragraph XIV of the said complaint, and further alleges that the mortgage security of this defendant is the only recourse which he, the said John Vories, has for the payment of his said mortgage debt.

XIII.

Defendant John Vories admits the allegations contained in paragraphs XV of the said complaint.

Wherefore this defendant prays—

1. That he be decreed to be the holder of a valid lien prior and paramount to all other liens upon 1,000 wethers and dry ewes from said sheep, marked as in his said mortgage described, and adjudged to be entitled to the possession thereof.

2. That the defendant The Riordan Mercantile Co. be decreed to deliver possession of the said number of sheep so described to this defendant or to pay to this defendant the value of the said sheep.

45 3. That the mortgage of the Arizona Lumber & Timber Co. and the pretended mortgage held by the Northwestern National bank be decreed to be subsequent and subject to the rights and equities of this defendant under his said mortgage.

4. That, if it should be adjudged by the court that the lien of this defendant is subsequent and subject to the lien of the Northwestern National Bank of Chicago, the said Northwestern National Bank of Chicago be decreed to proceed against its assignor, the Arizona Lumber & Timber Co., personally, and exhaust its remedy against the said corporation personally before it shall be permitted to subject the said mortgaged property to the satisfaction of the said mortgage indebtedness.

5. That the defendant The Arizona Lumber & Timber Co. be adjudged to pay to this defendant the amount due to him upon the said mortgage debt.

6. That the mortgage of this defendant may be foreclosed and the property described therein sold for the satisfaction of his said mortgage debt.

7. That the defendant may recover his costs and have such other and further relief as to the court may seem just and equitable.

TERRITORY OF ARIZONA, }
County of Coconino, } *ss:*

John Vories, first having been duly sworn, on his oath says: I am the defendant named in the foregoing answer. I have read the same and know the contents thereof, and the same are true of my

own knowledge save as to the matters and things therein
46 alleged upon information and belief, and as to those matters I believe them to be true.

JOHN VORIES.

Subscribed and sworn to before me this 2d day of August, A. D. 1894.

H. Z. ZUCK,
Notary Public.

EXHIBIT "A."

Chattel Mortgage.

Know all men by these presents: that Harry Fulton, a sheep-grower of the town of Flagstaff, county of Yavapai, Territory of Arizona, mortgagor, does hereby mortgage unto John Vories, of the town of Flagstaff, county of Yavapai, Territory of Arizona, mortgagee, all that certain personal property, situated and described as follows, to wit:

Wethers and dry ewes, to the number of one thousand, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right, ranging from May to November at and between the Rim ranch, two miles west of the A. & P. pump-house, south of Flagstaff, Arizona, and the Mountain ranch, in Fulton cañon, seven miles south from Mormon dairy, in Yavapai county. Ranging from November to May at and around Cañon Diablo, Arizona, and the Little Colorado river.

To have and to hold the same unto the said mortgagee and to his heirs and assigns forever.

47 And said mortgagor for himself, heirs and assigns, hereby covenants to *to* and with said mortgagee, his heirs and assigns, that he is lawfully possessed of said property as of his own personal estate, that the same is unincumbered, and that he and his heirs and assigns will warrant and defend the same to the said mortgagee and to his heirs and assigns against the claims of all persons as security for the sum of four thousand dollars, with interest at 1½%, the payment of the sum of money at the time and place and at the rate of interest as specified in a certain promissory note of even date herewith, and in the words and figures following, to wit:

$4,000.00. FLAGSTAFF, ARIZONA, *July 10th*, 1890.

Ninety days after date, I, as principal, without grace, for value received, promise to pay to the order of Jno. Vories at the Arizona Central bank, Flagstaff, Arizona, four thousand dollars in gold coin, with interest at 1½ per cent. per mo. from date until paid. And in event of suit by the legal holder hereof, collection fees of ten per cent. to be added and become a part of the judgment hereupon rendered. Secured by chattel and real mortgage.

(Signed) HARRY FULTON.

And these presents shall be void if such payment be made, but if default be made in the payment thereof, then the said mortgagee, his agent or assigns, are hereby authorized to proceed to sell the said mortgaged property, at public auction, from the front door of the post-office, in said town of Flagstaff, after notice to be
48 given by posting notices of such sale in three public places of said town of Flagstaff, fifteen days prior to the date of sale and from the proceeds of such sale pay all costs and expenses thereof including counsel fees of ten per cent. paying the whole of the indebtedness hereby secured, rendering the overplus, if any, to the mortgagor or his assigns.

It is hereby provided further, that if before said debt, hereby secured and payable becomes due, said mortgagor shall remove said property, or suffer the same to be done, from said county, or shall sell the same or suffer it to be done, or shall attempt so to do, or to in anywise make away with the same, or suffer it to be done, so that in anywise the security herein provided shall become in anywise impaired, then and in that event said debt and every part thereof shall become due and payable, and said mortgagee, his heirs, legal representatives, or assigns are hereby empowered to at once proceed to sell this property as above provided for in default of payment.

And the mortgagee or the party crying the sale is hereby constituted and authorized and empowered the agent of mortgagor for him and in his name and place and stead to make, execute and acknowledge a good and sufficient bill of sale conveying the property above described to purchaser which same bill of sale shall have all the force as if executed in his own proper person, and shall be competent authority in the hands of legal holder thereof, to
49 ask for, demand, sue for, and receive the possession of the property with complete title thereto.

Witness my hand this — day of July, A. D. 1890.

HARRY FULTON.

TERRITORY OF ARIZONA, } ss:
County of Yavapai, }

Harry Fulton, the mortgagor within named, and Jno. Vories, the mortgagee within named, being first duly sworn, each for himself and not one for the other doth depose and say that the foregoing mortgage is *bona fide* and made without any design to defraud or delay creditors.

HARRY FULTON.
JOHN VORIES.

Subscribed and sworn to before me this 12th day of July, A. D. 1890.

[SEAL.] J. H. HOSKINS, JR.,
Notary Public.

Endorsed: Filed and entered, at the request of Jno. Vories, at 12 o'clock m. on the 5th day of Jan., 1893, Book 1 of Chattel Mortgages, page 102, of the County of Coconino, Territory of Arizona. (Seal.) C. A. Bush, county recorder.

4—566

50 TERRITORY OF ARIZONA, } ss:
County of Coconino, }

I, C. A. Bush, county recorder in and for said county and Territory aforesaid and custodian of the records thereof, do hereby certify that I have compared the above and foregoing with and the same is a full, true, and correct copy of a certain chattel mortgage executed by Harry Fulton to Jno. Vories as the same now appears on file in my office, and a minute of which is entered in Book One of Chattel Mortgages, at page 102, records of the county of Coconino, Territory of Arizona.

Given under my hand and seal of office this 9th day of February, A. D. 1894.

C. A. BUSH,
County Recorder.

(Endorsed:) Filed August 2d, 1894. Oscar Gibson, clerk.

51 *Amended Answer of Riordan Mercantile Company.*

Comes now The Riordan Mercantile Company, one of the defendants herein, and, by its attorney, E. E. Ellinwood, makes answer to the amended complaint of the plaintiff- herein:

I.

That defendant Riordan Mercantile Company admits all matters and things contained in paragraph I of plaintiffs' amended complaint.

II.

The defendant Riordan Mercantile Company has no knowledge nor information concerning the matter set forth in paragraph II of plaintiffs' amended complaint, and therefore denies the same.

III.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph III of plaintiffs' amended complaint.

IV.

The defendant Riordan Mercantile Company has no information concerning the matters and things set forth in paragraph III½ of plaintiffs' amended complaint, and therefore denies the same.

V.

The defendant Riordan Mercantile Company denies each and every of the matters and things set forth in paragraph IV of plaintiffs' amended complaint.

52 VI.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 5 of plaintiffs' amended complaint.

VII.

The defendant Riordan Mercantile Company denies each and every of the matters and things set forth in paragraph 5½ of plaintiffs' amended complaint.

VIII.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 5½ A of plaintiffs' amended complaint, except that the defendant Riordan Mercantile Company admits that it did, on the 18th day of December, 1893, institute suit in the above-entitled court against the defendant Harry Fulton upon an open account for the sum of eight hundred and ten dollars and caused to be issued from said court a writ of attachment; which said attachment the defendant Sheriff J. J. Donahue duly executed by levying upon the following-described property, among other things, to wit:

All the right, title, and interest of the defendant Harry Fulton in and to the following-described sheep, to wit:

2,926 ewe sheep, marked hole in left ear, split in right ear; 900 wether sheep, marked hole in right ear, split in left ear; 1,287 lambs, ewe lambs marked hole in left ear, split in right; wether lambs marked hole in right ear, split in left.

53 And admits that thereafter, on the 16th day of March, 1894, judgment was entered in said cause in favor of defendant Riordan Mercantile Company for the sum of eight hundred and ten dollars and costs upon the default of the defendant Fulton, and a decree of foreclosure and order of sale was made, and on the 31st day of March, 1894, the sheep so levied upon were sold by the said sheriff and bought in by and became the property of the said Riordan Mercantile Company, defendant, and that the defendant Riordan Mercantile Company is now in possession of the same, but the defendant Riordan Mercantile Company denies that the sheep so levied upon and sold to it are the same sheep described in paragraph III of the plaintiffs' amended complaint.

IX.

The defendant Riordan Mercantile Company admits that the defendant Harry Fulton, on the 4th day of January, 1893, executed to defendant Arizona Lumber & Timber Company a mortgage covering, among other property, the following-described sheep, to wit:

About 3,000 ewes, 1,000 wethers, and 2,000 lambs, same being all the sheep now owned by mortgagor, and including all the wool and increase which may be produced by said sheep, all running on their accustomed range in Coconino county—marked, ewes split in right ear, hole in left, wethers reverse; and the defendant Riordan Mercantile Company denies all other matters and things set forth in paragraph 6 of plaintiffs' amended complaint, and denies

54 that said mortgage was or is subject to the alleged mortgages of John Vories, defendant, and the plaintiff- herein or

to any mortgage or mortgages of any person or persons, and denies that the property or any part thereof mortgaged by said defendant, Harry Fulton, to defendant Arizona Lumber & Timber Company is the same property as set forth in paragraph 6 of plaintiffs' amended complaint as having been mortgaged to the plaintiffs.

X.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 7 of plaintiffs' amended complaint, but admits that defendant Arizona Lumber & Timber Company acknowledges notice of the existence of certain notes to the amount of forty-eight hundred dollars, as therein set forth.

XI.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph VIII of plaintiffs' amended complaint, except that the defendant Riordan Mercantile Company admits that the defendant Harry Fulton, on the 30th day of August, 1893, executed and delivered to the said defendant, Arizona Lumber & Timber Company, a chattel mortgage covering, among other property, the following-described sheep, to wit:

55 About 3,200 ewes, more or less.

About 1,300 wethers, more or less.

About 1,400 lambs, more or less.

Being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep, all running on their accustomed range in Coconino county—marked, ewes and ewe lambs split in right ear and hole in left, wethers and wether lambs reversed.

XII.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 9 of plaintiffs' amended complaint.

XIII.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 10 of plaintiffs' amended complaint, except that the defendant Riordan Mercantile Company admits that the defendant Arizona Lumber & Timber Company sold, transferred, and assigned by endorsement, before maturity, to the defendant Northwestern National Bank of Chicago, Illinois, said promissory note and indebtedness secured by chattel mortgage.

XIV.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph II of plaintiffs' amended complaint.

56

XV.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 12 of plaintiffs' amended complaint.

XVI.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 13 of plaintiffs' amended complaint.

XVII.

The defendant Riordan Mercantile Company admits that the defendant Arizona Lumber & Timber Company is perfectly solvent, but the defendant Riordan Mercantile Company has no information and belief concerning the insolvency of the defendant Harry Fulton, and therefore denies the same. The defendant Riordan Mercantile Company denies all other matters and things set forth in paragraph 14 of plaintiffs' amended complaint.

XVIII.

The defendant Riordan Mercantile Company denies all matters and things set forth in paragraph 15 of plaintiffs' amended complaint.

XIX.

The defendant Riordan Mercantile Company denies each and every of the allegations of plaintiff- set forth in *his* said amended complaint not herein specially admitted.

57

XX.

The defendant Riordan Mercantile Company further alleges that on the 10th day of July, 1890, the defendant Harry Fulton was the owner of and had in his possession and under his control about six thousand two hundred and fifty (6,250) sheep, marked as follows: Ewes and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse; that the defendant Harry Fulton continued in the ownership, possession, and control of said sheep, running them on their accustomed range in what is now Coconino county, Territory of Arizona, until the 18th day of December, 1893, and that at no time were the said sheep or any of them (except such as died, strayed, were consumed by defendant Harry Fulton, were sold, lost or stolen) out of the possession and control of said defendant, Harry Fulton, prior to the 18th day of December, 1893, nor were they nor any of them at any time by said defendant, Harry Fulton, or any other person or persons set aside, distributed, separated, designated, or apportioned to the pretended mortgages of the said Arizona Central Bank, plaintiff, and John Vories, defendant.

XXI.

The defendant Riordan Mercantile Company further alleges upon information and belief that the alleged indebtedness of the defendant Harry Fulton to the plaintiff- herein, if any there was, has been by said defendant, Harry Fulton, fully paid, satisfied, and discharged.

58 Wherefore the defendant Riordan Mercantile Company prays the judgment of the court that the right, title, and possession of the defendant Riordan Mercantile Company in and to said sheep so purchased by the defendant under the attachment, foreclosure, and sale aforesaid be decreed valid in law and prior to all claim or claims of the plaintiff The Arizona Central Bank and the defendant John Vories, and that the pretended mortgages of the plaintiff Arizona Central Bank and the defendant John Vories be declared void and held for naught as against the rights of the defendant Riordan Mercantile Company under its purchase at such sale, and for such further and other relief as may seem to the honorable court meet and proper and for costs of suits in this behalf expended.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

F. W. Sisson, being duly sworn, deposes and says that he is the treasurer and agent of the above-named defendant, Riordan Mercantile Company, and as such treasurer and agent knows the facts set forth in the foregoing answer; that he has read the said answer and knows the contents thereof, and the same is true of his own knowledge except such matters as are therein set forth on information and belief, and as to such matters he believes the same to be true.

F. W. SISSON,
Treasurer and Agent Riordan Mercantile Co.

59 Subscribed and sworn to before me this 20th day of August, A. D. 1894.

[L. S.] OSCAR GIBSON,
Clerk Dist. Court.

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

60 *Amended Answer of Arizona Lumber and Timber Company.*

Comes now Arizona Lumber & Timber Company, one of the defendants herein, and, by its attorney, E. E. Ellinwood, makes answer to the amended complaint of the plaintiff- herein:

I.

The defendant Arizona Lumber & Timber Company admits all matters and things contained in paragraph I of plaintiffs' amended complaint.

II.

The defendant Arizona Lumber & Timber Company has no knowledge nor information concerning the matter set forth in paragraph 2 of plaintiffs' amended complaint, and therefore denies the same.

III.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 3 of plaintiffs' amended complaint.

IV.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 3½ of plaintiffs' amended complaint, except said defendant, Arizona Lumber & Timber Company, admits notice that defendant Harry Fulton agreed with plaintiff that death losses should be made good out of increase.

61

V.

The defendant Arizona Lumber & Timber Company denies each and every of the matters and things set forth in paragraph 4 of plaintiffs' amended complaint.

VI.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 5 of plaintiffs' amended complaint.

VII.

The defendant Arizona Lumber & Timber Company denies each and every of the matters and things set forth in paragraph 5½ of plaintiffs' amended complaint.

VIII.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 5½ A of plaintiffs' amended complaint, except that the defendant Arizona Lumber & Timber Co. admits that the said defendant, Riordan Mercantile Company, did on the 18th day of December, 1893, institute suit in the above-entitled court against the said defendant, Harry Fulton, upon an open account for the sum of eight hundred and ten dollars, and caused to be issued from said court a writ of attachment, which said attachment the defendant Sheriff J. J. Donahue duly executed by levying upon the following-described property, among other things, to wit:

All the right, title, and interest of the defendant Harry Fulton in and to the following-described sheep, to wit:

62 2,926 ewe sheep, marked hole in left ear, split in right ear.
900 wether sheep, marked hole in right, split in left ear.
1,287 lambs; ewe lambs marked hole in left ear, split in right;

wether lambs marked hole in right ear, split in left—and admits that thereafter, on the 16th day of March, 1894, judgment was entered in said cause in favor of defendant Riordan Mercantile Company for the sum of eight hundred and ten dollars and costs upon the default of the defendant Fulton, and a decree of foreclosure and order of sale was made, and on the 31st day of March, 1894, the sheep so levied upon were sold by the said sheriff and bought in by and became the property of the said Riordan Mercantile Company, defendant, and that the defendant Riordan Mercantile Company is now in the possession of the same; but the defendant Arizona Lumber & Timber Company denies that the sheep so levied upon and sold to the said Riordan Mercantile Company are the same sheep described in paragraph III of the plaintiffs' amended complaint.

IX.

The defendant Arizona Lumber & Timber Company admits that the defendant Harry Fulton, on the 4th day of January, 1893, executed to said defendant a mortgage covering, among other property, the following-described sheep, to wit:

About 3,000 ewes, 1,00– wethers, and 2,000 lambs, same being all the sheep now owned by mortgagor, and including all the wool and increase which may be produced by said sheep, all running
63 on their accustomed range in Coconino county, marked—ewes, split in right ear, hole in left; wethers, reverse; and the defendant Arizona Lumber & Timber Company denies all other matters and things set forth in paragraph 6 of plaintiffs' amended complaint, and denies that said mortgage was or is subject to the alleged mortgages of John Vories, defendant, and the plaintiff herein, or to any mortgage or mortgages of any person or persons, and denies that the property or any part thereof mortgaged by said defendant Harry Fulton to defendant Arizona Lumber & Timber Company is the same property as set forth in paragraph 6 of plaintiffs' amended complaint as having been mortgaged to the plaintiff.

X.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 7 of plaintiffs' amended complaint, but admits that it acknowledged notice of the existence of certain notes to the amount of forty-eight hundred dollars, as therein set forth.

XI.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 8 of plaintiffs' amended complaint, except that the defendant Arizona Lumber & Timber Company admits that the defendant Harry Fulton, on the 30th day of August, 1893, executed and delivered to said defendant, Arizona Lumber & Timber Company, a chattel mortgage covering,
64 among other property, the following-described sheep, to wit:

About 3,200 ewes, more or less,
About 1,300 wethers, more or less,
About 1,400 lambs, more or less,
being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep, all running on their accustomed range in Coconino county, marked—ewes and ewe lambs, split in right ear and hole in left; wethers and wether lambs, reverse.

XII.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 9 of plaintiffs' amended complaint.

XIII.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 10 of plaintiffs' amended complaint, except that the defendant Arizona Lumber & Timber Company admits that it sold, transferred, and assigned by endorsement, before maturity, to the defendant Northwestern National Bank of Chicago, Ill., the said promissory note and indebtedness, secured by a said chattel mortgage, for a valuable consideration, namely, current exchange, in hand paid by said defendant, Northwestern National Bank.

65

XIV.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 11 of plaintiffs' amended complaint.

XV.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 12 of plaintiffs' amended complaint.

XVI.

The defendant Arizona Lumber and Timber Company denies all matters and things set forth in paragraph 13 of plaintiffs' amended complaint.

XVII.

The defendant Arizona Lumber & Timber Company admits that it is perfectly solvent, but the defendant Arizona Lumber & Timber Company has no information and belief concerning the insolvency of defendant Harry Fulton, and therefore denies the same. The defendant Arizona Lumber & Timber Company denies all other matters and things set forth in paragraph 14 of plaintiffs' amended complaint.

XVIII.

The defendant Arizona Lumber & Timber Company denies all matters and things set forth in paragraph 15 of plaintiffs' amended complaint.

66 XIX.

The defendant Arizona Lumber & Timber Company denies each and every of the allegations of plaintiff- set forth in *his* said amended complaint not herein specifically admitted.

XX.

The defendant Arizona Lumber & Timber Company further alleges that on the 10th day of July, 1890, the defendant Harry Fulton was the owner of and had in his possession and under his control about six thousand two hundred and fifty (6,250) sheep, marked as follows: Ewes and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse; that the defendant Harry Fulton continued in the ownership, possession, and control of said sheep, running them on their accustomed range, in what is now the county of Coconino, Territory of Arizona, until the 18th day of December, 1893, and that — no time were the said sheep or any of them (except such as died, strayed, were consumed by defendant Harry Fulton, were sold, lost, or stolen) out of the possession and control of said defendant, Harry Fulton, prior to the 18th day of December, 1893, nor were they *nor* any of them at any time by said defendant, Harry Fulton, or any other person or persons set aside, distributed, separated, designated, or apportioned to the pretended mortgages of the said Arizona Central Bank, plaintiff, and John Vories, defendant.

67 XXI.

The defendant Arizona Lumber & Timber Company further alleges upon information and belief that the alleged indebtedness of the defendant Harry Fulton to the plaintiff- herein, as set forth in paragraph 2 of plaintiffs' amended complaint, if any there was, has been by said defendant, Harry Fulton, fully paid, satisfied, and discharged.

Wherefore the defendant Arizona Lumber & Timber Company prays the judgment of the court that its mortgage, as set forth in Exhibit "C" in plaintiffs' amended complaint and set forth herein, be adjudged and decreed to be a first and prior lien on the property therein described, and that the pretended mortgages of the plaintiff Arizona Central Bank and defendant John Vories be adjudged to be void in law as against this defendant, and for such further and other relief as may seem to the honorable court meet and proper, and for costs of suit in this behalf expended.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

F. W. Sisson, being duly sworn, deposes and says that he is the treasurer and agent of the above-named defendant, Arizona Lumber & Timber Company, and as such treasurer and agent knows the facts set forth in the foregoing answer; that he has
68 read the said answer and knows the contents thereof, and the same is true of his own knowledge, except such matters

as are therein set forth on information and belief, and as to such matters he believes the same to be true.

F. W. SISSON,
Treasurer & Agent Arizona Lumber & Timber Co.

Subscribed and sworn to before me this 20th day of August, 1894.

OSCAR GIBSON, *Clerk.*

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

69 *Amended Answer of the Northwestern National Bank.*

Comes now The Northwestern National Bank, a corporation, defendant herein, and makes the following amended answer to plaintiffs' amended complaint herein, and by way of demurrer alleges:

I.

That the said amended answer fails to state facts sufficient to constitute a cause of action against this defendant.

Wherefore this defendant prays the judgment of the court as to the sufficiency of said complaint and for costs.

1.

Further answering, this defendant admits the allegations contained in paragraph one of said complaint.

2.

Defendant has no knowledge or information sufficient to form a belief as to the allegations stated in paragraph two of said complaint, and therefore denies the same.

3.

This defendant denies the allegations set out in paragraph three of said complaint. Defendant, further answering said paragraph three, alleges that Exhibit "A," mentioned therein, attached to and made a part of said complaint, while claiming and pretending to be a chattel mortgage, is so uncertain and indefinite in the description of the property therein pretended to be conveyed that the
70 same is void and of no legal force and effect, and this defendant therefore denies that the same is a chattel mortgage.

3½.

Answering paragraph three and one-half in said complaint, this defendant has no knowledge or information sufficient to form a belief as to the allegations therein contained, and therefore denies the same, and specially denies that it ever had any knowledge of the facts alleged therein or of the pretended agreement set out therein.

4.

This defendant has no knowledge or information as to the allegations set up in paragraph four of said complaint, and therefore denies the same.

5.

Answering paragraph five of said complaint, this defendant says that it has no knowledge or information sufficient to form a belief as to the allegations therein contained, and therefore denies the same.

Further answering said paragraph five, this defendant says that the pretended chattel mortgage mentioned therein and designated as Exhibit "B," which said pretended mortgage is attached to the said complaint, is so uncertain and indefinite as to the description of the property pretended to be conveyed thereby that the same is void and is not a chattel mortgage covering any property whatever.

71

5½.

This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph five and a half of said complaint, and therefore denies the same.

This defendant also denies all the allegations of paragraph five and a half inserted in said complaint as an amendment thereto, and particularly denies that it had any knowledge or information whatever as to any of the allegations set up in the original paragraph five and a half in said complaint or any of the allegations set up in said amendment to paragraph five and a half, and denies that it had any notice, knowledge, or information from any source whatever of any of the facts set up in said two paragraphs above mentioned.

6.

This defendant, answering that paragraph of said complaint not numbered, but being on page eight, alleges that it has no knowledge or information of said allegations contained therein, and therefore denies the same.

7.

This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph seven of said complaint, and therefore denies the same.

8.

Defendant has no knowledge or information to form a belief as to the allegations contained in paragraph eight of said com-
72 plaint, except that defendant Harry Fulton made, executed, and delivered chattel mortgage and note mentioned therein, and therefore denies the said allegations, except the execution and delivery of the note and mortgage mentioned and designated as Exhibit "E" and attached to said complaint; and this defendant

alleges that said note and mortgage were given for full value, and that said mortgage and note so given were afterwards and before the same became due transferred, assigned, and delivered for full value to this defendant and without any notice or knowledge on the part of this defendant of any pretended equities alleged by plaintiffs and without any knowledge or information of the pretended wrongs or frauds claimed and alleged by plaintiffs.

9.

As to the allegations contained in paragraph nine of said complaint, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

10.

Answering the allegations of paragraph ten of said complaint, this defendant says that the Arizona Lumber & Timber Company did assign and transfer by endorsement the promissory note secured by said chattel mortgage dated August 30th, 1893, for six thousand dollars, payable ninety days after date, to this defendant, but for what purpose the same was transferred this defendant has no knowledge or information, except that is was for the purpose of realizing the full value of said note and mortgage.

73 Defendant has no knowledge or information that the same was transferred for the purpose of evading the pretended priority of the lien of plaintiffs' pretended mortgage, and therefore denies the same.

Defendant denies that it did not advance any money or other valuable thing as a consideration for said note and accept same in payment of prior indebtedness due to and owing to it from said defendant, The Arizona Lumber & Timber Company, and with full knowledge of plaintiffs' pretended mortgage against the property described in the mortgage now held by this defendant.

This defendant alleges that it paid full value for said note and mortgage; that the consideration was not for any past indebtedness, but for money advanced and paid on the same, and at the very time the said note and mortgage were purchased by it; that its purchase of said note and mortgage was in absolute good faith, without any knowledge or information of any equities or any pretended equities alleged and claimed by plaintiffs; that the purchase of said note and mortgage was made at Chicago, Illinois, and the money advanced then and there.

Defendant says it has not sufficient knowledge as to the value of the sheep on the 29th day of September, 1893, and therefore denies that at that time two dollars and fifty cents was a reasonable price or value for wethers, and that two dollars was a reasonable value for ewes and lambs.

74 11.

Defendant has no knowledge or information sufficient to form a belief as to the allegations made in paragraphs eleven and twelve of said complaint, and therefore denies the same.

(12.)

13.

Admits the allegations of paragraph thirteen.

14.

Defendant has not sufficient knowledge and information as to the solvency of the Arizona Lumber & Timber Company to justify it in admitting the same, and therefore denies said allegations of paragraph fourteen.

15.

Upon information and belief admits the allegations of paragraph fifteen of said complaint.

Further answering said complaint, this defendant alleges that the pretended mortgages set up in said complaint, marked Exhibits "A" and "B," are void because of the uncertainty in the description of the property pretended to be mortgaged thereby; that the said Harry Fulton, at the time said mortgages were given, had and owned, as plaintiffs and defendant John Vories well knew, six thousand two hundred head of sheep of the same marks or same mark as the sheep included in said mortgages "A" and "B," and ranging upon the same range and included in the same band as the sheep pretended to be conveyed in said mortgages designated
75 as "A" and "B."

Further answering said complaint, this defendant denies generally and specifically each and every allegation therein contained, except such as are hereinbefore specifically admitted. Wherefore this defendant, having fully answered, asks to go thence with *his* costs.

This defendant The Northwestern National Bank, a corporation, by way of cross-complaint, alleges:

1.

That it is now and at all times hereinafter mentioned was a corporation organized and existing under the laws of the United States and having its residence and place of business at the city of Chicago, in the county of Cook, in the State of Illinois.

2.

That the residence and corporate capacity of the other parties to this action are as alleged in plaintiffs' complaint.

3.

That on the thirtieth day of August, 1893, defendant Harry Fulton, being then indebted to the Arizona Lumber & Timber Company in the sum of six thousand dollars, did on that day, at Flagstaff, in the county of Coconino, in the Territory of Arizona, make, execute, and deliver to the said Arizona Lumber & Timber Company his certain negotiable promissory note for six thousand dollars in the words and figures, to wit:

76 $6,000.00. FLAGSTAFF, ARIZONA, *Aug. 30th*, 1893.

90 days after date, waiving grace, notice, and protest, for value received, I promise to pay to Arizona Lumber & Timber Company or order the sum of six thousand dollars, with interest thereon at the rate of one and one-half per cent. per month from date until paid; principal and interest payable in gold coin of the United States of the present standard at the office of the Arizona Lumber & Timber Company, Flagstaff, Arizona.

(Signed) HARRY FULTON.

That on the same day and at the same time and place the said Harry Fulton, to secure the payment of said promissory note, made, executed, and delivered to the said Arizona Lumber & Timber Company his certain chattel mortgage, dated on that day, upon about thirty-two hundred ewes, more or less; about thirteen hundred wethers, more or less; about fourteen hundred lambs, more or less, being all the sheep then owned by said Harry Fulton, including all the wool and increase which may be produced by said sheep, all running on their accustomed range in Coconino county, Arizona, marked as follows:

The ewes and ewe lambs split in right ear and hole in left, wethers and wether lambs reverse; also twenty-five half-blood Shropshire rams, thirty-three Merino rams, two full-blood Dickenson rams, one full-blood Shropshire ram, about sixty ram lambs, two farm wagons, one spring wagon, one buckboard, ten horses, and three colts, branded HF on left hip, and two sets of double harness.

77 That on the thirty-first day of August, 1893, the said mortgage was duly filed in the recorder's office of Coconino county, Arizona, the residence of said mortgagor and the place where said property was and is, as directed by law, a duly certified copy of which mortgage is attached to plaintiffs' amended complaint, marked Exhibit "E" and made a part hereof, and asked to be read as a part of this complaint; that thereafter, before the maturity of said note, to wit, on the seventeenth day of September, 1893, the said Arizona Lumber & Timber Company, mortgagee in said mortgage, for value, to wit, cash in hand then paid to it by this defendant, at the city of Chicago, State of Illinois, did sell, assign, transfer, and deliver the said promissory note and mortgage to secure it, and ever since that time and now this defendant has been and is the legal owner and holder thereof; that prior to this defendant's purchasing said note and mortgage one thousand dollars was paid thereon; that no other or further sum has been paid upon said note and mortgage, and the principal sum, to wit, five thousand dollars, with interest thereon at the rate of one and one-half per cent. per month from the thirtieth day of August, 1893, is now due and owing from said defendant, Fulton, to this defendant; that said note and mortgage are long since past due, and demand has been made for the payment of the same and payment thereof refused.

78 4.

That plaintiffs and defendant Vories claim and pretend that they have a mortgage on the property mentioned and described in plaintiffs' mortgage, and that the defendant The Riordan Mercantile Company claims that it has some right and interest in said property by attachment and order of sale in a certain suit instituted by the said Riordan Mercantile Company against Harry Fulton in this court, claiming that said property was purchased at a sale made by defendant Donahue, Sheriff, of Coconino county, under said order of sale; that this defendant has a prior right, lien, and mortgage to and upon said property, and the claim and pretended claims of the plaintiffs and defendant and each of them are all subsequent to and subject to the rights of this defendant.

Wherefore this defendant prays that *his* said mortgage may be foreclosed upon the property described therein, now in possession of the defendant Riordan Mercantile Company, as it is informed and believes, and the said property and each and every thereof be sold and the proceeds thereof be applied to the payment of this defendant's debt and interest, including counsel fees of ten per cent., as provided in said mortgage, and the costs and expenses of this defendant in this action and attending this foreclosure, and that should there be any surplus remaining that the same be paid out under the order and direction of this court; that should said
79 property not sell for enough to pay this defendant's debt, counsel fees, costs, and expenses that this defendant have judgment for the deficiency against said Harry Fulton, as well also as against the Arizona Lumber & Timber Company, the endorsers of said note, and for such other and further relief in the premises as to the court may seem just and proper.

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

80 *Plaintiffs' Answer to Defendant Vories' Cross-complaint.*

Comes now the plaintiffs herein and for answer to the cross-complaint of defendant John Vories state:

I.

That they deny each and every allegation therein contained as fully and specifically as if each of said allegations were set forth herein and denied separately.

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

81 *Plaintiffs' Answer to Defendant Northwestern National Bank's Cross-complaint.*

Comes now the plaintiffs herein and for answer to the Northwestern National bank's amended cross-complaint state:

I.

That they deny each and every allegation therein contained as fully and specifically as if each of said allegations was herein set forth and denied separately.

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

82 *Demurrer to Cross-complaint of Northwestern National Bank.*

Comes now the defendant H. Fulton, by his attorney, and demurs to the cross-complaint of the defendant Northwestern National Bank filed herein, and for grounds of demurrer alleges—

That the said cross-complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant H. Fulton prays judgment of the sufficiency of said cross-complaint and for costs.

(Endorsed:) Filed August 20th, 1894. Oscar Gibson, clerk.

83 *Decree of Foreclosure.*

On this day came all the parties, plaintiffs and defendants, and this cause coming on to be heard by the court upon the complaint of plaintiffs, B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr., a copartnership doing business under the firm name of Arizona Central bank, and upon the answer and cross-complaint of defendant John Vories, and the answer and cross-complaint of defendant The Northwestern National Bank, a corporation, and the answers of the Arizona Lumber & Timber Company and the Riordan Mercantile Company, corporations, and the answer of defendant J. J. Donahue, and all the parties announcinf ready for trial—

The plaintiffs introduced their evidence, which consisted of verbal testimony of witnesses and documentary evidence; whereupon plaintiff- rested.

Then defendants and cross-complainants John Vories and the Northwestern National Bank introduced their evidence, which consisted of oral testimony of witnesses and documentary evidence.

Then the defendant- The Arizona Lumber & Timber Company and The Riordan Mercantile Company then introduced oral testimony of witnesses and documentary evidence; whereupon the case was closed.

84 After hearing the argument of counsel and the evidence being fully considered, the court finds—

That there is due from defendant Harry Fulton to the plaintiffs, for principal and interest upon the note mentioned and set forth in the complaint, the sum of seventy-six hundred eighty-two & $\frac{83}{100}$ dollars, which sum is to draw interest from the date hereof at the rate of 1½ per cent. per month, together with costs, in the sum of $26.95, and attorney fee to the amount of three hundred and fifty dollars, expended by plaintiffs in and about their said suit.

That there is due from defendant Harry Fulton to defendant John Vories, for principal and interest upon the note mentioned and set forth in his cross-complaint, the sum of twenty-seven hundred fifty-five dollars and $\frac{50}{100}$ dollars, which sum is to draw interest from the date hereof at the rate of $1\frac{1}{2}$ per cent. per month, together with his costs, at the sum of seventy-five cents, and attorneys' fee expended in and about this suit, at the sum of two hundred and fifty dollars.

That there is due from the defendant Harry Fulton to defendant The Arizona Lumber & Timber Company, for principal and interest for its said debt and mortgage, the sum of four hundred eighteen dollars, which sum is to draw interest from the date hereof at the rate of — per cent. per month.

85 That there is due from defendant Fulton to the defendant The Northwestern National Bank, for principal and interest upon the debt and mortgage set forth in plaintiffs' complaint, the sum of $5,875.00, which sum is to draw interest at the rate of $1\frac{1}{2}$ per cent. per month from the date hereof, and that defendant Arizona Lumber & Timber Company *are* liable to the Northwestern National bank as endorser on said note, and it may have judgment, if it so desires, in this action against said endorser.

It is therefore considered by the court that the plaintiffs do have and recover from the defendant Harry Fulton the said sum of seventy-six hundred eighty-two and $\frac{83}{100}$ dollars, principal and interest, with interest thereon from the date hereof at the rate of $1\frac{1}{2}$ per cent. per month, together with costs at the sum of twenty-six and $\frac{95}{100}$ dollars and attorneys' fees at the sum of three hundred and fifty dollars, and that the defendant and cross-complainant John Vories do have and recover from the said defendant, Harry Fulton, the said sum of twenty-seven hundred and fifty-five dollars and $\frac{50}{100}$ —, principal and interest, with interest thereon from the date hereof at the rate of one and one-half per cent. per month, together with costs at the sum of seventy-five cents and attorneys' fees at the sum of two hundred and fifty dollars, and that the Arizona Lumber

86 & Timber Company do have and recover from the said defendant, Harry Fulton, the sum of $418.00, principal and interest, with interest thereon from the date hereof at the rate of — per cent. per month, and that the Northwestern National bank do have and recover of the said defendant, Harry Fulton, the said sum of $5,875.00, principal and interest, with interest thereon at the rate of $1\frac{1}{2}$ per cent. per month from the date hereof, together with its costs.

The court further finds from the evidence in this case that the mortgages of plaintiffs and John Vories were duly executed and recorded as provided by law, and that the defendants The Arizona Lumber & Timber Company and The Riordan Mercantile Company on the 3rd day of January, 1893, and a long time prior thereto and ever since, had actual notice of the existence of the said mortgages and the property covered thereby and upon which the same were a lien.

That F. W. Sisson was the treasurer of both the defendant com-

panies, and as such on the 3rd day of January, 1893, agreed to and with the plaintiffs and the said John Vories that their said mortgages and the sheep therein described should be kept good out of the increase: that as a consideration therefor the plaintiffs and the said John Vories then and there released the wool clip which was then upon said sheep and covered by their said mortgages
87 for the said year 1893, of the value of five thousand dollars, to the said defendant companies, and forebore the foreclosing of their said mortgages, then long past due; that thereafter, on the 4th day of January, 1893, the defendant The Arizona Lumber & Timber Company took a mortgage from defendant Harry Fulton in terms upon about six thousand sheep and in terms upon all the sheep of the defendant Fulton, including the increase, and in terms subject to a mortgage on five thousand of the same sheep to plaintiffs, and in terms subject to a mortgage on one thousand of the same sheep to defendant John Vories, which numbers were to be kept good out of said increase, and on said date said defendant, Fulton, had no more than six thousand sheep; that on the 30th day of August, 1893, the defendant Fulton executed his mortgage to defendant Arizona Lumber & Timber Company in terms upon fifty-nine hundred sheep, more or less (excepting the rams), and in terms upon all of the defendant Fulton's sheep, which at that time, including the increase of said sheep after January 3rd, 1893, did not exceed six thousand sheep in number and were the indentical sheep, including their increase of the spring of 1893, upon which the said mortgage of January 3rd, 1893, was given, saving such as had been lost by natural causes.

That on said 30th day of August, 1893, the date of the execution of the said mortgage by defendant Fulton to the Arizona Lumber & Timber Company, there were upon record in the county of
88 Coconino, the residence of the mortgagor and the range of the sheep covered by said mortgages, the mortgages of plaintiffs John Vories and the first mortgage to the Arizona Lumber & Timber Company, all executed by defendant Fulton from the same mark of sheep described as ranging, in each of said mortgages, in the same section of the country, none of which were satisfied.

The court further finds from the proofs offered in this case that the Riordan Mercantile Company acquired only the rights of defendant Fulton in and to the sheep covered by the plaintiffs and defendant Vories' said mortgages, and acquired no rights superior to those of plaintiffs and defendant Vories or any of the other defendant- herein.

That the sheep covered by plaintiffs' said mortgage lien consists of five thousand head of sheep, marked as follows: Ewes, with a hole in left ear and split in right ear; wethers, with a hole in right ear and split in left ear; and that one thousand more of said sheep in said mark were covered by a mortgage of defendant John Vories; that plaintiffs' said mortgage and that of defendant Vories were duly executed and filed according to law and properly described the sheep covered thereby by marks, both on the 3rd day of January, 1893, and on the 30th day of August, 1893.

89 The court accordingly finds that the plaintiffs and the defendant John Vories have a prior and first lien, the plaintiffs upon five thousand sheep of the Fulton mark by virtue of their said mortgage, the defendant John Vories upon one thousand of said sheep of the Fulton mark by virtue of his said mortgage; that the lien of the plaintiffs is for the sum of seventy-six hundred eighty-two and $\frac{83}{100}$ dollars, principal and interest, upon their said note and mortgage, together with their costs in the sum of twenty-six and $\frac{95}{100}$ dollars and attorneys' fee in the sum of three hundred and fifty dollars; that the lien of the defendant John Vories is for the sum of twenty-seven hundred and fifty-five and $\frac{50}{100}$ dollars, principal and interest, upon his said note and mortgage, together with his costs in the sum of seventy-five cents and attorneys' fees in the sum of two hundred and fifty dollars.

That the Northwestern National bank has a second and subsequent lien upon said sheep to the liens of the plaintiffs and John Vories for the sum of $5,875.00, principal and interest, and two and $\frac{50}{100}$ dollars costs, but a first lien to the lien of the Arizona Lumber & Timber Company, and that the Arizona Lumber & Timber Company's lien for the sum of $418.00, principal and interest, and costs in the sum of two and $\frac{50}{100}$ dollars, is subsequent to the liens of

90 all the aforesaid parties, and that the defendant The Riordan Mercantile Company's lien is subsequent to the lien of the Arizona Lumber & Timber Company, as well as to the liens of all the other parties herein; that said J. J. Donahue had no right, title, or interest in or to any of said property.

It is therefore ordered, adjudged, and decreed by the court that the liens of the plaintiffs and the defendant John Vories upon the above-described sheep be, and the same are hereby, foreclosed, and that the clerk of this court do issue an order of sale, directed to the sheriff or any constable of Coconino county, Arizona, commanding him to seize and sell the above-described sheep as under execution, and that he apply the proceeds of such sale as follows, to wit: That if there be sufficient proceeds he will pay the entire judgments of the plaintiffs and the defendant John Vories; but should there not be sufficient proceeds to pay both said judgments in full, together with interests and costs and attorneys' fees, then that the proceeds be applied in the proportion of five dollars to plaintiffs to one dollar to the defendant John Vories; and if the said sheep shall sell for more than sufficient to pay off and satisfy the said judgment liens of the plaintiffs and the defendant John Vories, then the said officer is hereby directed to pay over the excess to the Northwestern National bank; and should there be an excess after paying off the lien of the defendant The Northwestern National Bank, the

91 said officer is hereby directed to pay over such excess to the defendant The Arizona Lumber & Timber Company; and should there be an excess after paying off and satisfying the judgment of the Arizona Lumber & Timber Company, then said officer is directed to pay such excess to the defendant The Riordan Mercantile Company; but if the said sheep should not sell for enough to satisfy and pay off the judgment liens of the aforesaid parties in

the order of superior rights herein stated, then said officer is directed to make the balance due said parties or any of them upon their respective judgment liens as under execution out of any other property of the defendant Fulton.

Done in open court this 21st day of August, A. D. 1894.

(Endorsed:) Filed August 22nd, 1894, at 3 o'clock p. m. Oscar Gibson, clerk.

92 *Minutes of the Court.*

AUGUST 20TH, 1894.

The hearing of this cause was taken up at 2 o'clock p. m. and the pleadings were read by counsel for respective parties. Harry Fulton, J. H. Hoskins, Jr., and John Vories were called, sworn, and testified in behalf of plaintiff-; documentary evidence was introduced in same behalf; J. H. Hoskins was recalled, after which plaintiff- rested their case with the court.

AUGUST 21ST, 1894.

Trial of cause was resumed; Harry Fulton recalled for plaintiff-, and plaintiffs rest. On behalf of defendant John Vories, Harry Fulton was introduced, as well as documentary evidence.

Defendant Riordan Mercantile Company introduced Harry Fulton and F. W. Sisson, and further documentary evidence was given in evidence.

After the foregoing proceedings this cause was resumed and C. H. Coble was introduced and sworn in behalf of Riordan Mercantile Company, and F. W. Sisson was recalled, after which said defendant rested case with the court.

F. W. Sisson was introduced on behalf of Northwestern National bank, after which evidence was closed and case taken under consideration by the court, pending decision later as to whether oral arguments should be had or on brief.

93 AUGUST 22ND, 1894.

The argument of the questions of law involved in this case was taken up and the matter was considered until 12.30 p. m. of this day, when court took a recess until 1.30 p. m.

This case was finally heard, and, counsel representing respective parties being present, it was ordered, adjudged, and decreed that judgment be entered as follows:

That the mortgage held by the Arizona Central bank and likewise the one held by defendant John Vories be foreclosed with order of sale; proceeds to be apportioned between said mortgagees in the ratio which the numbers of sheep originally covered by said mortgages bear to each other, and which said proportion is more fully set out and defined in the decree on file herein.

AUGUST 23RD, 1894.

A motion for a new trial having been filed herein and submitted to the court and overruled, said motion having been filed on behalf

of defendants Arizona Lumber & Timber Company, Riordan Mercantile Company, and The Northwestern National Bank, and each of said defendants saved exceptions to said ruling—

Come now Arizona Lumber & Timber Company, by attorney, E. E. Ellinwood, and Riordan Mercantile Company, by its attorney, E. E. Ellinwood, and The Northwestern National Bank, by its attorneys, Herndon & Norris, and in open court gives notice of
94 appeal to the supreme court of the Territory of Arizona from the order of judgment and decision of the court and from the judgment and decree of the court heretofore entered herein in the above-entitled cause, from each and every part thereof and from the whole thereof, and from the order of the court in overruling said defendants' motion for a new trial filed in said cause.

On motion of E. E. Ellinwood, attorney for Arizona Lumber & Timber Company and Riordan Mercantile Company, and Herndon & Norris, attorneys for the Northwestern National bank, it is ordered that the defendants Arizona Lumber & Timber Company, Riordan Mercantile Company, and The Northwestern National Bank each have twenty additional days, to wit, thirty days after the adjournment of the present term of this court, in which to prepare and reduce to writing their bills of exceptions and statement of facts in said cause and present the same to the judge for allowance.

On the further motion of E. E. Ellinwood, the execution of the judgment and decree entered herein is hereby stayed as against defendants above named for twenty days, to allow said defendants to file a supersedeas bond.

Court adjourned for the term August 23rd, 1894.

95 *Memorandum of Costs and Disbursements.*

Disbursements.

Sheriff's fees	$16 95
Clerk's fees	26 95
Witness fees	4 00
Certified copies of exhibits	9 75
Reporting	10 00
Constable's fees	1 80

TERRITORY OF ARIZONA, }
County of Coconino, } ss:

J. H. Hoskins, Jr., being duly sworn, deposes and says that he is the cashier and a partner in the above-entitled action, and that the items in the above memorandum contained are correct, and that the said disbursements have been necessarily incurred in the said action, to the best of his knowledge. —— ——.

Subscribed and sworn to before me this 24th day of August, A. D. 1894.

[L. S.] J. W. ROSS,
Notary Public.

(Endorsed:) Filed August 24, 1894. Oscar Gibson, clerk.

96 *Supersedeas Bond.*

Whereas in the above numbered and entitled cause pending in the above-entitled court and at a regular term of said court, to wit, on the 21st day of August, A. D. 1894, the said day being a day of the regular August term, 1894, of the above-entitled court, and the above-named B. N. Freemen, F. L. Kimball, and J. H. Hoskins, Jr., a copartnership doing business under the firm name of Arizona Central Bank, plaintiff, and the defendant John Vories on his cross-complaint recovered judgment against the defendants Harry Fulton, Arizona Lumber & Timber Company, a corporation; Riordan Mercantile Company, a corporation, and The Northwestern National Bank, a corporation, the said judgment being for the sum of seventy-six hundred eighty-two and $\frac{83}{100}$ dollars, and three hundred and fifty dollars attorneys' fees, in favor of the plaintiffs B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr., a copartnership doing business under the firm name of Arizona Central bank, and also being for the sum of twenty-seven hundred & fifty-five and $\frac{50}{100}$ dollars, and two hundred and fifty dollars attorneys' fees, in favor of John Vories, said judgment being against the defendant Harry Fulton, and also for the foreclosure of mortgages, to wit, the said B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr., a copartnership doing business under the firm name of Arizona Central
97 bank, for foreclosure of mortgage on five thousand head of sheep, and the judgment in favor of defendant John Vories on his cross-complaint, also being for the foreclosure of a chattel mortgage on one thousand head of sheep, said judgment of foreclosure of said chattel mortgages in favor of plaintiffs and in favor of defendant John Vories on his cross-complaint upon five thousand head and one thousand head respectively, upon which said sheep the defendant Arizona Lumber & Timber Company, a corporation, and the Northwestern National bank, a corporation, claim to have and hold prior mortgages to the mortgage of plaintiffs and defendant Vories, and which said sheep the defendant Riordan Mercantile Company, a corporation, claim to own by virtue of purchase under execution and sale, free from the mortgages of plaintiffs and said defendant, Vories;

Which judgment in favor of plaintiffs and defendant Vories each bears interest at the rate of one and a half per cent. per month from the said 21st day of August, 1894, and which said judgment was also for costs, taxed at the sum of twenty-seven and $\frac{70}{100}$ dollars; and

Whereas the said defendants, Arizona Lumber & Timber Company, a corporation; Riordan Mercantile Company, a corporation, and The Northwestern National Bank, a corporation, have taken an appeal from said judgment and desire to suspend the execu-
98 tion of said judgment during the pendency of said appeal:

Now, therefore, we, Arizona Lumber & Timber Company, a corporation; Riordan Mercantile Company, a corporation, and the Northwestern National bank, a corporation, as principals, and

D. M. Riordan, by occupation lumberman and stockman, and F. W. Sisson, by occupation lumberman and stockman, and T. A. Riordan, by occupation lumberman, as sureties, all of said sureties being residents of Coconino county, in the Territory of Arizona, hereby acknowledge ourselves bound to pay to plaintiffs B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr., a copartnership doing business under the firm name of Arizona Central bank, and defendant John Vories the sum of twenty-three thousand dollars, as follows: The said principals in the full amount; the said sureties in the following amount: D. M. Riordan, the amount of seventeen thousand dollars; F. W. Sisson, in the amount of three thousand dollars; T. A. Riordan, in the amount of three thousand dollars, the said amount of twenty-three thousand dollars being at least double the amount of the judgment, interests, and costs of said action—

Conditioned that said defendants, Arizona Lumber & Timber Co., a corporation; Riordan Mercantile Co., a corporation, and the Northwestern National bank, a corporation, shall prosecute their appeal with effect, and in case the judgment of the appellate court shall be against said defendants and appellants that said
99 appellants shall perform its judgment, sentence, or decree and pay all such damages as said appellate court may award against them, said defendants and appellants.

Witness our hands and seals this 10th day of September, 1894.

D. M. RIORDAN. [SEAL.]
F. W. SISSON. [SEAL.]
T. A. RIORDAN. [SEAL.]
RIORDAN MERCANTILE COMPANY, [SEAL.]
By F. W. SISSON, *Treasurer.*
THE NORTHWESTERN NATIONAL BANK, [SEAL.]
By HERNDON & NORRIS, *Its Attorneys.*
ARIZONA LUMBER & TIMBER COMPANY, [SEAL.]
By F. W. SISSON, *Treasurer.*

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

The defendants D. M. Riordan, F. W. Sisson, & T. A. Riordan, the sureties in the foregoing supersedeas bond, being duly sworn, each for himself says that he is worth the amount for which he has signed this bond over and above his just debts and liabilities, exclusive of property exempt from execution.

D. M. RIORDAN.
F. W. SISSON.
T. A. RIORDAN.

100 Subscribed and sworn to before me this 10th day of September, 1894.

[L. S.] OSCAR GIBSON,
Clerk Dist. Court, Coconino County, Arizona.

I have fixed the probable amount of costs of the above-entitled action of both the appellate and the court below at three hundred and fifty dollars, and I approve the foregoing bond this 10th day of September, A. D. 1894.

[L. S.] OSCAR GIBSON,
Clerk District Court, 4th Judicial District of the Territory of Arizona, County of Coconino.

(Endorsed:) Filed September 10th, 1894, at 3.10 o'clock p. m. Oscar Gibson, clerk.

101 *Bill of Exceptions.*

Be it remembered that this cause came on for trial in the above-entitled court on the twentieth and twenty-first days of August, 1894, the same being days of the regular August term of said 1894 court.

The case was tried before the court without a jury upon the pleadings in cause and upon the evidence introduced upon the trial. This bill of exceptions contains all the evidence introduced upon the trial, thereby avoiding the necessity of a statement of facts in accordance with act No. 9 of the Seventeenth Legislative Assembly of the Territory of Arizona and in accordance with subdivision 3 of rule 1 of the amended rules of the supreme court of the Territory of Arizona; and upon the said trial the following exceptions were saved:

The defendant The Northwestern National Bank filed a demurrer to the complaint of plaintiffs on the ground that said complaint fails to state facts sufficient to constitute a cause of action against said defendant. Said demurrer heard by the court was overruled; to which action of the court in overruling the said demurrer the defendants then and there excepted.

Thereupon the following proceedings were had:

J. H. HOSKINS was sworn as a witness for plaintiff- and testified as follows:

I am thirty-four years old; have resided in Flagstaff since
102 February, 1887. I am in the banking business and am one of the plaintiffs in this case.

(It is admitted by all of the parties that the plaintiffs are partners, as alleged in the complaint.)

I know Harry Fulton. I became acquainted with him very shortly after I came to Flagstaff. He is one of the defendants in the case. Mr. Fulton was indebted to me on the 10th day of July, 1890, in about the sum of $6,300.00. He executed a mortgage to me at that time to secure that indebtedness. The certified copy of the mortgage shown me is a copy of the said mortgage so given by Fulton.

Here plaintiff- offered in evidence the said mortgage, a copy of which said mortgage is attached to the complaint of plaintiffs,

marked Exhibit "A," and is not included in this bill of exceptions, for the reason that it appears as an exhibit in said complaint; to the introduction in evidence of this mortgage the defendants except Vories excepted, for the reason that the description of the property attempted to be mortgaged is insufficient and the mortgage on its face is void, for the reason that the description of the property is so vague and indefinite and uncertain as to render the instrument void, and the mortgage does not attempt to convey all of the sheep of defendant Fulton, but a certain number of sheep out of a greater number, and there is nothing given in the mortgage whereby those attempted to be mortgaged could be identified.

103 The court overruled the objection; to which ruling of the court the said defendants then and there duly excepted, and said mortgage was admitted in evidence, a copy of which said mortgage is attached to the complaint of plaintiff-, marked Exhibit "A," and is made a part of this bill of exceptions as if incorporated herein.

Witness then continued:

The indebtedness mentioned in said mortgage has not been paid. I have the figures here. The amount, with interest that is now due, is seven thousand six hundred and eighty-two dollars and eighty-three cents, interest computed to date. This does not include attorneys' fees, but is the amount of the note and interest added up to date.

I know Mr. Sisson. He is treasurer, I believe, in the Riordan Mercantile Co. and the Arizona Lumber & Timber Company. I have known him about seven years. He was acting on behalf of those companies on the third day of January, 1893, in his official capacity. On the third of January, 1893, I had business transactions with Fulton and Mr. Sisson, representing the two companies. I was acting on behalf of the Arizona Central bank. It was in the afternoon. They were arranging for a new mortgage. Sisson was desiring Fulton to give him a new mortgage. He had a mortgage drawn up and brought it there, which was to secure the indebtedness of Fulton. There was also some negotiations in regard to the wool on the sheep, which were to be put into the new mortgage. Sisson desired me to sign a release—desired Vories and myself to sign the release of the wool. He wanted us to sign the re-

104 lease for all time, but we emphatically declined to do so, and we also objected to the form of the mortgage and stated we would not carry Fulton any longer, and we could not go on with the deal unless our mortgages were distinctly recognized. We raised the point that the character of the sheep might change from year to year.

Here said defendants objected to testimony of this character or any testimony which takes from or adds to the description of the property in the mortgage itself. The mortgage is the best evidence for a description of the sheep, and any parol evidence must *go* the descriptive words in the mortgage itself. The Northwestern National bank further objected to the introduction of any testimony

of this character for the reason that it is hearsay, so far as said defendant is concerned, and could not be binding upon said defendant unless *he* was present or had notice or knowledge thereof or was connected therewith. Plaintiffs announced they would connect said bank with the transaction, and thereupon the court overruled said objections, and said defendants then and there duly excepted.

Q. Go ahead.

A. We objected to the form of the mortgage, and I suggested an insertion to be made in the mortgage, to which Sisson at first declined or objected. We stated to him that we wouldn't go on with the deal; we would not sign any release of wool, and we wouldn't submit to any new mortgage being given unless that was put in.

We insisted upon that agreement with him—Mr. Vories and
105 myself. We had some spirited talk in regard to it, and after some erasures from the mortgage—some property that had been put in, some real estate—and some other talk Sisson finally agreed with us.

Q. What did he agree?

A. He entered into that agreement that I inserted in the mortgage—the form of it. Do you wish me to give the words of the agreement——

Q. You may state——

Said defendants objected for the reason that there was no consideration shown for any contract, and as to the Northwestern National bank it was not a party to that contract and could not be bound by any contract, nor could that contract be tried in this proceeding; which objection the court overruled; to which ruling of the court the said defendants then and there excepted.

Witness then continued.

This agreement was entered into by Sisson and myself, and thereupon I wrote the agreement into the mortgage. It is inserted there in my handwriting; and I afterwards released the wool right there.

Q. What was the value of the wool?

To which question said defendants then and there objected as being immaterial and incompetent and as having no connection with the issues of the case; which objection the court overruled; to which ruling said defendants then and there excepted.

106 The witness then answered:

A. I think about five thousand dollars. I executed the release of the wool to Sisson and for the companies that he represented. I know the deals between Fulton and the two companies, the Arizona Lumber & Timber Company and the Riordan Mercantile Company, as to the manner of their taking mortgages. Mr. Sisson always claimed to represent both companies. The paper you hand me is the original mortgage, which was about to be executed on the third of January, 1893, from Fulton to the Arizona Lumber & Timber Company. There is an interlineation in that which I wrote myself before the execution of the mortgage. This

interlineation was positively agreed to by Sisson for both companies. The interlineation is in these words: "This being subject to a mortgage on five thousand of the above sheep to the Arizona Central bank and one on one thousand head and the residence property to John Vories, said property as described in the mortgage to be kept good out of increase."

I am acquainted somewhat with the sheep business in this country. I have dealt some in sheep and frequently taken security on sheep for the last five or six years. I know the Fulton sheep; they were a good grade of sheep. I should say that the value of the ewes was two dollars, from a dollar and a half to two dollars, and the wethers from two dollars to two fifty and the lambs about a dollar. I have made a demand on Fulton for the money and he has not paid me.

107 Cross-examination:

I said that on the twenty-ninth day of September, '93, two dollars and two fifty was a reasonable value for wethers. About that time there was some sales made for about two dollars a head. There was some shipments the prices of which I could not remember positively, but I know of some sales now that netted about two dollars and thirty-five cents just about that time. They were sheep shipped to California. These sheep were sold to butchers in Los Angeles. My recollection is that it netted about two thirty-five. They were some Moritz wethers. I saw the Fulton sheep last winter. Ewes and lambs were worth one dollar and a half to two dollars. I don't know that I remember of any selling just at that date or about that time. There was some mortgage sales where sheep sold for less than that figure, but those sheep were inferior in condition to Mr. Fulton's. I can't remember the date. They were some of Humphrey's and Austin's sheep. They sold for considerable less, but they were in very inferior condition and no criterion for these sheep. That was a transaction I had myself. I did not sell any of the Norris sheep at that time. I believe some of them were sold, some old sheep on contract, at two twenty-five. Sisson acted for both companies in January, '93, and represented the whole business of Fulton with the mill people.

Q. Did you have any agreement or understanding or any contract in regard to the Riordan Mercantile Company?

A. I asked the question about the total indebtedness up
108 at the mill on behalf of the two companies. He represented the whole indebtedness.

Q. Wasn't it as a matter of fact to the Arizona Lumber & Timber Co.?

A. I don't know that it was.

Q. You don't know there was any?

A. I know that drafts were drawn on the Riordan Mercantile Co.; drawn by Fulton.

Q. I want to ascertain—were you doing business on behalf of the Arizona Lumber & Timber Co.? What was said in regard to the

Riordan Mercantile Co.? Isn't it a matter of fact it was only your suspicion? You know of no transactions there with the Riordan Mercantile Co.?

A. Yes, sir.

Q. What was it?

A. I know of his drawing on the Riordan Mercantile Co.

Q. That was prior to this time?

A. He stated that this amount covered the drafts that had been made. Fulton stated to me that he had been making drafts there for running expenses and paying interest; things of that kind. These amounts he stated were put in this amount.

Witness continuing:

Sisson made a statement that led me to believe that it was wiping out the whole indebtedness that Fulton was owing to both companies; that this mortgage wiped it all out.

109 I don't know that Fulton owed the Riordan Mercantile Co. anything at that time except what he, Fulton, told me. Sisson stated to me that he represented the whole debt. Drafts were made on the Riordan Mercantile Co. I don't say that they never did draw on the Arizona Lumber & Timber Co. I don't know anything concerning the arrangement of their books. I know that Fulton was drawing in accordance with instructions that had been given him. Sisson told me that was the whole indebtedness. The mortgage that I hold is dated July 10th, 1890.

Q. That mortgage covered the wool and increase?

COUNSEL FOR PLAINTIFF-: We will admit it does not in terms.

Q. (Repeated)

A. Not in terms. If I had foreclosed the mortgage and taken the sheep, I would have taken the wool. There was no understanding in terms and in fact with Fulton that the mortgage didn't cover the wool. There never was a definite agreement. The understanding was that as long as we were running along in good shape he could have the wool money for running expenses. There was no agreement in the event of my foreclosing on the sheep I couldn't take the wool. The understanding was that as long as he went on in good shape he could have the wool money to use for running expenses.

Mortgage shown to witness under date of November 7th, 1891, given by Fulton to the Arizona Central bank.

110 Witness continued:

This mortgage is in my handwriting, but the same has been paid and satisfied. The property mortgaged is described as follows:

"All of my sheep, consisting of about fourteen hundred lambs, eighteen hundred and thirty six ewes, about two thousand wethers—ewes marked with a hole in the left ear and a split in the right ear: reversed in wethers—together with all the increase and all the bucks, subject, however, to a mortgage on five thousand sheep to the Arizona Central bank and a mortgage on one thousand sheep

to John Vories; also all wool grown upon all my sheep, said wool being unincumbered."

The note of July 10th, 1890, mentioned in the mortgage of that date, was a collateral note for other notes and for future advances. There was about sixty-three hundred dollars due on the note at the time it was given, and the balance was for advances. The other notes to which this was collateral have been renewed from time to time. There were several of those smaller notes. When we renew these notes we give up the old notes or the memoranda notes, as we call them. Some of them have been renewed, but not paid. Interest was paid along from time to time. The amount now due is seven thousand six hundred dollars.

Q. When Fulton sold his wethers from time to time what became of the money?

To which question the plaintiffs objected for the reason that
111 there is no evidence that he sold any wethers; which objection was by the court sustained; to which ruling of the court said defendants then and there excepted.

Cross-examination.

By attorney for defendant Vories:

On January third, '93, when this agreement was made, Mr. Vories was present, and he was a party to this contract. The contract applied to his mortgage as well as to ours. The consideration was the same in both cases. It was really a triangular agreement. I drew the Vories mortgage myself.

Redirect examination:

In this transaction the way I put the question to Sisson, as I remember it, is this: "How much does he owe your people?"—some general remark of that kind—and he gave me the amount. On the 3rd of January, '93, I received *and* an acknowledgement from the Arizona Lumber & Timber Co. as to the amount of our claim and as to our mortgage. That acknowledgement was executed by Sisson on that date. This is the acknowledegment in writing; it reads as follows:

"Arizona Central bank.

FLAGSTAFF, ARIZONA, *Jan. 3rd*, 1892.

We hereby acknowledge notice of the existence of notes to the amount of forty-eight hundred dollars (4,800.00), secured by mortgage on sheep of H. Fulton, as set forth in said mortgage; which mortgage is prior to our mortgage.

ARIZONA LUMBER & TIMBER CO.,
By F. W. SISSON, *Treas.*"

112 That bears date January third, '92; it should be 1893. It was given January 3rd, 1893. It was an error in the date. The new year had just come in. The second day after this trans-

action I discovered an error in the amount of eleven hundred dollars and I went over to Sisson and apprised him of it and gave him a corrected statement of the amount. That was before there was any change in the release or before Fulton had drawn anything against the mortgage. This is a copy of the corrected notice:

"1, 5, '93.

The undersigned hereby acknowledges receipt of payments on 7,500.00 mtg. from Harry Fulton to Arizona Central bank reducing same to 5,923.00 on this date.

ARIZONA CENTRAL BANK.
J. H. HOSKINS, JR., *Cas.*

This is correction of an error in rec't given on 1, 3."

I spoke of notes being made on the Riordan Mercantile Co. There were two—two mortgage notes were made on the Arizona Lumber & Timber Co. I don't know of any notes being made to the Riordan Mercantile Co. Those notes to the Arizona Lumber & Timber Co. were secured. I am not sure of the dates. I know of two mortgages, two mortgage notes, going to the Arizona Lumber & Timber Co. I don't know how many I knew of at the time that Sisson was at the bank at this transaction—January 113 3rd, 1893. Those are all the notes that I recollect of now.

JOHN VOGEL, sworn as witness for plaintiff, testified as follows: I am forty-one years old; have resided in Flagstaff for about six years; am assistant cashier of the Arizona Central bank. I know defendant Fulton and Mr. Sisson. I had a transaction with Fulton and Sisson, representing the defendant companies, and with the plaintiff on the third day of January. This was in the bank, in the afternoon. Fulton, Sisson, Hoskins, and myself were present. Sisson came in for the purpose of getting our sanction to a mortgage he was about to take from Fulton. This was the day before the mortgage was executed. He brought the mortgage with him and read it to us. We objected to the mortgage being given in the shape it was in for the reason that the mortgage covered everything that Fulton owned on the way of sheep and also the increase, wool, and everything else in connection with it. I objected on the ground that the notes—that my mortgage didn't recite as covering the increase, and he said something to the effect that that was all right—that it was understood. I said, It may be all right as between us parties, but we may not be in existence when this mortgage is closed up. I want to show something of the relation that one stands to the other; and Hoskins insisted on something to the same effect, and it was finally agreed that that insertion should be made in this mortgage, reciting that our mortgages were to be kept good out of the increase.
114 Sisson kind of objected to it at first, but finally said, "If I agree to this, I want you to agree to release the wool

for this coming season." We agreed to do so. The wool was then on the sheep. We released the wool. This insertion was put in the mortgage and the mortgage was executed on the following day. I saw Hoskins write that insertion in the mortgage. Hoskins refused to advance any more money. The lumber company were to continue to advance money provided they would get the wool. The understanding was that my mortgage was to be kept good out of the increase; that was written in; Sisson agreed to it.

The foregoing testimony was all received subject to the objection of the Riordan Mercantile Co. and the Northwestern National bank, they not being parties to any agreement or understanding between these parties and having no connection with the said mortgages; which objection the court overruled and admitted said testimony subject to the said objection; to which ruling the said defendants then and there excepted.

Q. Do you know of any course of dealing whereby a mortgage had been made payable to the Arizona Lumber & Timber Co. by Fulton and drafts for future advances made on the Riordan Mercantile Co.?

Objected to by said defendant- for the reason that it was immaterial and not germane to any issue in the case; which objection was overruled by the court, and said defendants then and there excepted to such ruling.

Q. What was the course of dealing between Fulton and the two companies in relation to obtaining their money when they
115 executed a mortgage?

Same objection, ruling, and exception.

A. The drafts that Fulton drew for money? I don't know of any being drawn otherwise than on the Riordan Mercantile Co.

Q. Do you know whether he ever executed a note payable to the Riordan Mercantile Co.?

A. I do.

Q. Which was the course of dealing—that he made notes payable to the Riordan Mercantile Co. and drew against them or made them payable to the Arizona Lumber & Timber Co. and drew against the Riordan Mercantile Co.?

A. I would assume it was both ways; I have reason to believe it was done both ways.

Q. State what you know.

A. I know he had dealings with the Riordan Mercantile Co. previous to this.

Witness continuing:

This mortgage I speak of was given to the Arizona Lumber & Timber Co. I never knew of any drafts coming otherwise than to the Riordan Mercantile Co. I don't know that Sisson said in so many words whom he was representing. I suppose he was representing both. I don't know that he said he represented both companies at that time in so many words. Pre-

vious to this he told me. I think it was some time in July,
116 '92. That is my recollection; about the time that Fulton gave a mortgage to the Riordan Mercantile Co.

The said defendants, The Riordan Mercantile Co. and The Northwestern National Bank objected to anything going to another transaction at another time as immaterial and not responsive to the issues; plaintiffs announced that the connection would be shown; which objection was overruled by the court; to which ruling of the court the said defendants then and there duly excepted.

A. I think it was some time in July, 1892, that Fulton gave a mortgage to the Riordan Mercantile Co. At that time my mortgage was not a matter of record. I went to Sisson first and told him my mortgage was not a matter of record.

Here said defendants objected further to any conversation between these parties. Plaintiffs announced that the connection would be shown. Objection overruled; to which ruling said defendants duly excepted.

Witness continued:

I went to Sisson and asked him what knowledge from Fulton they had of the matter of my mortgage. He said they had full knowledge and accepted it as a prior lien to their claim. He said they were contemplating a change in the mortgage, and when that change was made he would allow me to record my mortgage first so as to show the claim, which he did. At that time Sisson was representing the Riordan Mercantile Co. I accepted this representation and allowed my mortgage to remain as it was
117 and forebore to foreclose on that account. I did not have any conversation with Mr. Sisson about foreclosing, but I would have taken steps to foreclose if he had not told me. This mortgage given to the Arizona Lumber & Timber Co. January 4th was the first mortgage that was given to that company that I know of. This was not the mortgage that was afterwards transferred with the note to the Northwestern National bank.

Cross-examination.

By Mr. CLARK, attorney for defendant Vories:

I do not remember the amount of this mortgage given to the Riordan Mercantile Co.; it was released. It became a part of this mortgage which was given to the Arizona Lumber & Timber Co. on January 4th. Mr. Sisson told me he would make this change and release the mortgage that they hold. This release was made on the 5th of January, I think.

Cross-examination.

By attorneys for defendants except Vories:

In testifying to the usual course of dealing between Fulton and the Arizona Lumber & Timber Co. and the Riordan Mercantile Co.

I couldn't say as to what these drafts covered. The drafts he drew were on the Riordan Mercantile Co. I couldn't say as to whether he had given a note and then drew on the Riordan Mercantile Co. It was part of our agreement that we were to extend our indebtedness, Hoskins and I, and not to take any active steps, but let our mortgages run along.

118 We agreed to this with Mr. Sisson.

We positively refused to carry Fulton any longer unless he would consent to this proviso. The Riordan Mercantile Co. had been furnishing him with supplies prior to this time, I suppose. As far as I was concerned I didn't furnish him with supplies. The interest was not always paid on the note; some payments were made by drafts on the Riordan Mercantile Co. Sisson said if he agreed to this that he wanted us not to foreclose and to release the wool. That part of the agreement was not in writing; the writing was inserted in the mortgage; that was the agreement that was put in the mortgage, and the consideration of all this was the release of the wool and that we were not to foreclose. The language he used about foreclosing—he wanted Fulton to have a chance. He wanted us to carry our mortgage and give Fulton a chance to turn himself. We positively refused to carry him longer on the present basis. We would have foreclosed had Fulton executed such a mortgage as he started to—as Sisson started to have him execute; that was talked over at the time. Fulton owes me at this time two thousand seven hundred and fifty-five dollars and seventy cents, and I have demanded it of him; that is exclusive of attorney fee. My mortgage covers other property besides the sheep—some real estate here in town. The amount was four thousand dollars; one note, four thousand dollars. These are the mortgages attached to my pleading. There is only one mortgage attached; that is of the personal property.

119 Which said mortgage mentioned by witness is attached to his answer and cross-complaint, marked Exhibit "A," and made a part of this bill of exceptions as full as if incorporated herein.

HARRY FULTON, a witness on behalf of the plaintiff-, sworn and examined as follows: I am one of the defendants. I have known Mr. Hoskins about seven years. I know Mr. Sisson. The other defendants here I know comparatively little of. I went to Hoskins' bank. In executing that matter I am concerned with the others. I took the inventory at the time of the attachment, on the 18th of December, '93. I counted the sheep in connection with the sheriff. The sheep are between thirty and forty miles south of here, in Coconino county. The record shows the number of the sheep on that date. I cannot tell separate and apart from the records. I made the proper inventory, which was delivered to the sheriff. I remember the transaction that occurred in the bank on January 3rd, '93, when Hoskins, Sisson, Vories, and myself were present. There is no change in the sheep from January 3rd, 1893, to December 18th, '93, except from the natural loss on the range. May and

June is the lambing season. The lambs specified in the inventory mean the lambs of '93; the May and June lambs. At the time of the giving of the mortgage in 1893 the sheep were estimated.

Q. If there were 2,926 ewe sheep on the 18th of December,
120 how many would there be on January 3rd, '93? And state how you would estimate it.

Objected to as incompetent and immaterial. Objection overruled; to which ruling of the court said defendants excepted.

A. It is difficult to arrive at any such number. If among ewes, the loss is comparatively light for that particular season. I presume one hundred head would be the conservative number to estimate.

Q. How about the wethers?

A. There is a loss comparatively slight of them.

Q. If there were nine hundred on the 18th of December, how many would there have been on January 3rd?

A. Of course there is butchering along from time to time for commercial use, and that would be for eleven months, possibly, say, 88 or 90 head up to that date in round numbers.

Q. And the lambs, 1,287. Were the lambs of the increase occurring in May and June?

A. In May and June.

Q. There were none sold from January 3rd, 1893?

A. No.

Witness continuing:

I received at the end of every month a statement from the Riordan Mercantile Co. and from the Arizona Lumber & Timber Co. The last statement I received from them was in December, '93. I did not receive the statement from them in January. The property was under attachment to December the 18th,
121 '93. I have a statement that I received from my creditors. I asked for a statement on the first of January, '94, and I received it from them. I have that statement here.

Q. Will you present it?

Witness does so.

Defendants objected to it as immaterial and incompetent; it has no date, no name, no title, and without any signature, and objected to by the Northwestern National bank for the further reason that it is incompetent and immaterial and has no connection with any matter in issue; which objection was overruled by the court; to which said ruling said defendant excepted and the paper was admitted.

The witness continuing:

I wrote to the parties interested in this business for the statement to January first, '94. I don't know whether I directed it to F. W. Sisson, treasurer, or to the Riordan Mercantile Co. or to the Arizona Lumber & Timber Co.; I can't say. The following is a copy of the paper introduced in evidence:

122 "Note, $8,885.00.

Dr. int.—

Dec. 31, '92, to Dec. 31, '93		$1,599 24
Cr. int.—		
2, 8, '93, to 12, 31, '93	$31 72	
1, 16, " " " " "	92	
4, 21, " " " " "	373 50	
8, 30, " " " " "	300 00	
	706 14	
Net Dr. int.		$893 10
Paid—		
2, 8, '93	$205 39	
1, 16, "	5 40	
4, 21, "	3,000 00	
8, 30, "	5,000 00	
	$8,210 79	
Face	8,885 00	
	674 21	
Jan. 1, '94, net bal.		$1,567 31

E. & O. E.

Note	$5,000 00
Int., 8, 30, '93, to 12, 31, '93	300 00
Jan. 1, '94, net bal.	$5,300 00

E. & O. E.

This note disc't'd."

123 Witness continuing:

I have a receipt for three thousand dollars, which is shown on this statement, which I now hand you:

"Riordan Mercantile Company.

$3,000.00. FLAGSTAFF, A. T., 4, 21, 1893.

Received of Harry Fulton three thousand dollars, credited on note.

(Our best thanks.)

RIORDAN MERCANTILE COMPANY,
By F. W. SISSON, *Treas.*

No. 1223 [R]."

Witness continues:

This paper now handed me is an agreement of the Arizona Lumber & Timber Co., by F. W. Sisson, treasurer, that I should handle

the clip of '93 through Babbit Brothers; that I should pay them three thousand dollars of the proceeds.

Which paper is marked Plaintiffs' Exhibit 5 and read in evidence as follows:

124 "ARIZONA CENTRAL BANK,
FLAGSTAFF, ARIZ., *Jan.* 4, 1893.

We hereby agree that Mr. Harry Fulton shall have the privilege of handling the wool this day mortgaged to us through Babbit Brothers, with the proviso that three thousand — ($3,000.00) of the proceeds of same shall be paid to us.

ARIZONA LUMBER AND TIMBER COMPANY,
By F. W. SISSON, *Treas.*"

Witness continuing:

At the time of the execution of the second mortgage, on the 30th of August, '93, to the Arizona Lumber & Timber Co. there was new consideration passed at that time which was for advances to use in running the business. I did not get any money at the time, but had a provision for future advances. On the 31st day of August, 1893, there was one thousand dollars endorsed on that note to the Arizona Lumber & Timber Co. I did not know it at the time; I gave the matter no thought. The note was drawn in favor of the Arizona Lumber & Timber Co. There was no conversation regarding which company I should draw on. Going back to the first dealing, I always drew, through the treasurer's instructions, on the Riordan Mercantile Co. As they never said anything to me to the contrary, I continued in that way. Mr. Sisson was treasurer of both companies.

125 Cross-examination.

By Mr. ZUCK, attorney for Vories:

In round numbers, I had six thousand two hundred sheep at the time these mortgages were executed to the Arizona Central bank and to John Vories. These two mortgages covered practically all my sheep. I gave the Arizona Lumber & Timber Co. a mortgage on August 30th, 1893, to cover future advancement. Five hundred dollars was allowed for this purpose, if I remember correctly. The balance of the note, six thousand dollars, was for money and supplies already drawn.

Q. Before the giving of this mortgage was the amount of that indebtedness secured — this mortgage of August 30th, 1890?

Objected to by the said defendants as immaterial and incompetent. Objection overruled; to which ruling said defendants then and there excepted.

A. Secured by the mortgage to the Riordan Mercantile Co.—mortgage of January, 1893.

Q. To the Arizona Lumber & Timber Co.?
A. Yes, sir.
Q. To the Arizona Lumber & Timber Co.?
A. Yes, sir.
Q. How much of this prior indebtedness was there secured by this mortgage of August 30th credited on the indebtedness secured by this mortgage of January 3rd, '93?
126 A. I don't know how much was credited.
Q. How much does that statement show?
A. There is a credit here of a note for five thousand dollars.
Q. Did you execute a mortgage to the Riordan Mercantile Co. July, '92?

Said defendants objected for the reason that it was immaterial and incompetent and not germane to any issue in the case; which objection was overruled by the court; to which ruling said defendants then and there excepted, and witness answered:

A. Yes, sir.
Q. How was the indebtedness secured by that mortgage paid, if it was paid? State whether or not that indebtedness has been paid.
A. In what year? This is 1892.
Q. The mortgage to the Riordan Mercantile Co., July, '92.
A. I am not clear enough on that to give a detailed history of it just now.
Q. Wasn't this mortgage given to the Riordan Mercantile Co.—did it not become a part of the mortgage which you gave the Arizona Lumber & Timber Co. on Janurary 3rd, '93? Was not that prior mortgage cancelled by the giving of that latter mortgage?
A. I regarded it as such.

Witness continues:

Sisson did not tell me that he had cancelled the mortgage. I believed it to be a part of the new mortgage, but I cannot recollect the conversation. The mortgage you refer—in '92—is can-
127 celled. The record shows that. It is not clear in my mind whether that became a part or not of the January 3rd mortgage. The mortgage for eight thousand eight hundred dollars, given on January 3rd, was to liquidate the mortgage that was prior to this date and to secure future advances. On August 30th, '93, I executed my note and mortgage for six thousand dollars to the Arizona Lumber & Timber Co. Upon that note there is an endorsement of one thousand dollars' credit.

Cross-examination.

By attorneys for defendants except Vories:

At the time I gave the mortgage to the Arizona Central bank and to Vories I had about six thousand two hundred sheep. Hoskins and Vories knew that. I told them.

Q. What was to be done with the wool—was that under the mortgage?

Objected to as incompetent unless it was put in writing. Objection sustained; to which ruling of the court these defendants then and there duly excepted.

Witness continues:

I was present on January 3rd and fourth, '93, when these releases were made by Vories and the Arizona Central bank.

J. H. HOSKINS, recalled for plaintiff, testified as follows:

On January 3rd, '93, Vories and myself offered to accept an extension of time. The consideration was not merely the
128 release of the wool, but also that we would not foreclose on our mortgage at that time; that we would carry the paper along. We stated absolutely we would not carry the paper along if that mortgage was drawn up as it was. We objected to going any further with the loan, both myself and Vories, and that was a part of the consideration for the insertion that was made in the mortgage. I think the wool brought about five thousand dollars. On January 3rd, '93, the wool was then on the sheep, and there was enough sheep in this band to pay both Vories and myself.

Cross-examination:

Q. You didn't intend at that time to foreclose that mortgage, anyway?

Objected to as immaterial, what he intended, unless something was said; which objection was sustained by the court; to which ruling of the court these defendants then and there excepted.

A. We said we would not go along with the deal any longer if that mortgage was given.

Q. Was that said?

A. Yes, sir.

Q. What was meant?

A. I meant what I said. I meant that I would not carry the loan any further.

Q. And meant you would foreclose?

A. I would foreclose and clear myself the best I could. I
129 said I would not carry the loan.

Q. Didn't talk about foreclosing at all?

A. I don't know that the word foreclose was used. The idea was plainly conveyed that I wouldn't carry that loan longer.

Q. You didn't think about foreclosing?

A. Yes, sir; I suggested to Sisson the taking up of our claim. I said to him this: that he could either take up our claim, we wouldn't carry it any longer; if he wanted the mortgage in that shape he could take up our claims.

Witness continued:

I could have made my money out of the loan. I don't remember

whether I had advanced anything to Fulton for a year before that time, and I don't remember whether the Riordan Mercantile Co. paid me interest through Fulton. As a matter of fact, this agreement and their taking the wool was conditioned to me so my loan would not run up, and they would take it and carry him along, and I looked upon it as a condition that we would forbear from *foreclosure* foreclosing.

This was all the testimony offered in behalf of plaintiff-; whereupon counsel for defendant The Northwestern National Bank moved the court that, so far as said defendant was concerned, the case be dismissed as to it; that the evidence shows no cause of action against it and no proof or showing of any notice or knowledge as to the bank of any of the matters testified to, the allegation of
130 plaintiff- being that this defendant purchased the note and mortgage with notice, the plaintiff- having only to show either notice or knowledge.

Said motion was argued by the respective counsel, and, after argument, was denied by the court and overruled; to which ruling of the court the defendant The Northwestern National Bank then and there duly excepted.

Afterwards counsel for plaintiff- announced that he had neglected to prove an important matter, and by consent--

HARRY FULTON was recalled and testified as follows:

I am insolvent. I have no property except that included in the mortgages which have been mentioned by me in this case. I have transferred all of my valuable property to my creditors.

131 Here plaintiffs rested their case.

Thereupon the following proceedings were had:

JOHN VORIES was called in his own behalf and testified as follows:

Mr. Fulton is indebted to me in the amount of $2,755.50, the balance due on the note and mortgage which I hold against him.

The same were admitted in evidence without objection, Exhibit "A," attached to said defendant Vories' answer and cross-complaint, being a correct copy of the said mortgage, and the same is not incorporated in this bill of exceptions, but is referred to and made a part hereof the same as if fully set out herein.

Witness then proceeds:

I have made demand for the payment of the balance due on this note. The real mortgage which I hold against Mr. Fulton was foreclosed and the amount realized therefrom is endorsed on the note. I have no other recourse for the satisfaction of my debt except the sheep covered by this mortgage.

HARRY FULTON, called as a witness in behalf of defendant Vories, testified as follows:

This paper shown me is a mortgage executed in favor of the

Riordan Mercantile Co. July 1st. 1892, $5,000.00. I executed it.

132 It was released January 5th, '93. The mortgage dated Jan. 4th, '93, is one in favor of Arizona Lumber & Timber Co. executed by me. It covers the same property as set forth in the other mortgage, with some different property. As to the sheep, they are the same. A certified copy of this mortgage is annexed to the complaint. A portion of the indebtedness of this mortgage of January, '93, is a portion of the mortgage to the Riordan Mercantile Co. The old mortgage was cancelled by this new one.

Q. You afterwards, in August, 1893, executed another mortgage to the Arizona Lumber & Timber Co. for the sum of six thousand dollars. Was that in payment of any portion of the mortgage we have introduced in evidence, the $8,800.00 mortgage?

Objected to by counsel for defendant The Northwestern National Bank as immaterial and incompetent unless it is shown this defendant had notice; which objection was by the court overruled; to which ruling the defendant then and there excepted, and witness answered:

It was given to cancel the former mortgage and protect future advances.

Witness then proceeds:

About that time I had paid the Arizona Lumber & Timber Co. some money I received for wool, about three thousand dollars, for which amount a receipt was given; that I presented here this

133 morning. That left me owing the Arizona Lumber & Timber Co. about five thousand five hundred dollars. I stated in my former testimony that I was to have further advances to the amount of five hundred dollars. This latter mortgage was given to secure the former mortgage and five hundred dollars future advances.

Cross-examination of HARRY FULTON.

By attorney for Arizona Lumber & Timber Co. & Riordan Mercantile Co.:

I do not know what is due now on the $8,800.00 mortgage. The full face value is not due at this time. It was partially satisfied. The latter mortgage, the one of August, embodies the greater portion of that. Just what their method of book-keeping in regard to debits and credits, regarding these mortgages, was I can't state. The mortgage of January third covered other property besides the sheep. After I executed these mortgages to Hoskins and Vories on July 10th, '90, I continued to graze the sheep mortgaged on the range in my possession. They were not separated or divided, but they were in different bands. I did not have a separate band of one thousand and a band of five thousand or a band of two hundred. There was no distinction made in the sheep except as I stated in the mortgages. They continued in my possession just the way I had been

running them. At the time the attachment was levied by the sheriff, December 18th, 1893, I had none of the male sheep that were included in the Hoskins and Vories mortgages, and the
134 lambs described by the sheriff are the lambs of the year 1893. In the season of 1891 there was an unusually heavy loss among ewes. I have to approximate how many there were. I presume a thousand head would be in existence on December 18th, '93—I mean a thousand head of those ewes I mortgaged in July, 1890. These were not included in the increase, and there were no male sheep I can't say about the dry ewes. There might be some in the band in '90 that would not be there afterwards. There are about 1,600 lambs this year. I sold mutton sheep after this mortgage of July 10, '90, was given. I deposited the proceeds from the sheep in the plaintiffs' bank and used the same in various ways. I sold over 1,700 sheep.

Q. Who got the money on those sheep?

Objected to by counsel for plaintiff- as immaterial; which objection was sustained by the court; to which ruling of the court the defendants, except Vories, then and there excepted.

Q. What became of the proceeds?

A. I deposited it in the bank and checked against it in various ways—payments of interest, converting the two notes into one note, and general running expenses. These 1,700 sheep that we sold brought three dollars a head. I sold them between '90 and '93, right along, all the time. The bank knew where this money
135 came from that I turned in there. They knew it was from the sale of the sheep. They were mutton sheep that I sold. Vories also knew of it. He was in the bank constantly. The mortgage of July 10th, 1890, was a collateral mortgage, to protect notes given from time to time. I am unable to say what the indebtedness was at that time.

Q. These notes protected by the collateral mortgage—were they then paid?

Objected to by counsel for plaintiffs because it asks for a conclusion of law, whether the note is paid or whether it is renewed. The objection was sustained; to which ruling of the court the defendants, except Vories, excepted.

Witness proceeds:

The note- the $7,500.00 was given to secure were merged at times, two notes into one note, and Hoskins, as cashier of the bank, would write the word "renewed" across the face of it and give me that note, and then I would give him a new one. I don't remember whether the individual notes were paid or renewed. I presume I have the greater number of them in my possession. They are in town, but not here with me.

The wool that I got from the sheep in 1890 and '91 was either all sold on the ground or I consigned it and had it sold, and when

remittances were made I used the money in operating the
136 business. I handled the wool myself. Nothing was said about it by the plaintiffs The Arizona Central Bank or Vories. I went right along handling it as though there was no mortgage on the sheep. I was present at the Arizona Central bank with Mr. Hoskins, Mr. Vories, and Mr. Sisson on or about January third, 1893. A new mortgage was given then to the Arizona Lumber & Timber Co.

Q. Subsequent to that what was the conversation there between Sisson, Vories, and Hoskins?

Objected to by the Northwestern National bank for the reason that it is incompetent and immaterial and is undertaking to prove a contract between these parties, in which this defendant was not interested and of which it had no notice or knowledge; which objection was overruled by the court; to which ruling of the court the defendant The Northwestern National Bank then and there excepted, and the witness answered:

A. The discussion was of such a broad nature I couldn't tell all that transpired there at the time you refer to.

Q. What was said there?

A. Relative to what? The conversation was broad.

Q. The release of your wool clip leading up to the execution of that mortgage. What did they, the parties, say there—Hoskins, Vories, Sisson, and yourself?

A. I said very little.

137 Q. What did they say?

A. The discussion was rather animated, but it finally came down to the general drawing of a mortgage, and the mortgage speaks for itself.

Q. Was there any agreement drawn there in writing.

A. There was the release of this wool.

Q. Hoskins say anything to you about foreclosing the mortgage?

A. I didn't hear that.

Q. You didn't hear anything about foreclosing at all?

A. Not to me.

Q. Were you present at the time?

A. I was there in the room; yes, sir.

Q. Did you hear him talk about forebearing to foreclose?

A. As I said before, the conversation was somewhat animated at first. I never felt at any time that there was anything of a serious nature going to come about in the immediate clearing up of my affairs.

Q. You didn't hear him say anything about foreclosing?

A. I did not hear him; no, sir.

Q. Did he tell Sisson that he would forebear to foreclose if he did certain things?

A. I can't recollect an expression of that nature. If it was said, it entirely escaped my memory.

138 Q. Did you hear the Riordan Mercantile Company discussed?

A. This mortgage was drawn up in favor of the Arizona Lumber & Timber Company. Whether the Riordan Mercantile Company's name was mentioned I can't say.

Q. You don't remember its being mentioned?

A. I can't say as to that; no, I don't remember one way or the other—that it was or was not.

Witness continued:

When the attachment was levied I turned the sheep I had in my possession over to the sheriff.

Cross-examination.

By counsel for the Northwestern National bank:

I gave this collateral note for notes already in existence and for future advances. I have done no new business with plaintiffs outside of that collateral note—that is, I have done business of a different nature in which the collateral note cut no figure. At the time this collateral note was given there were already notes in existence and this note was made a collateral to them. I don't know how to answer as to how much of those notes I have paid. I don't know that any note was returned to me cancelled as paid. We would simplify matters by converting two, possibly three, notes into one by a large payment on one or two notes and paying the interest up; simplifying matters by making it into one note.

139 I put considerable money into the bank and was credited with it, credited on my general account. Then I would pay up one note, partially pay another, and make renewals of the balance. The debt has been materially reduced at times; it has fluctuated; sometimes it has been within the limit between a dollar and seven thousand five hundred. It has fluctuated as payments were made from time to time or they had accrued from time to time. Interest has increased, and that is all the increase that has been added. My limit under this mortgage never went beyond the $7,500.00. If there was any new indebtedness it was kept distinct from the mortgage. I got money there after the time this mortgage was made in 1890. When I got money there I gave one note for a certain amount—I think at one time, a thousand or eleven hundred dollars—but that was not included in these renewals; it was distinct from the mortgage notes. On January the first, 1894, there was due on that mortgage and note $7,009.00, and whatever is in addition to that is simply the interest; that is the interest from January first, 1894. I certainly made payments on the note, so there would be quite a changing in the face value of the notes. The payments were from sales of mutton or from sales of wool. I cannot approximate the amount I have paid.

140 Cross-examination by counsel for plaintiffs:

Yes; I have sworn that certain sheep were sold from July 10th along for a couple of years. They were covered by the Riordan

Mercantile Company's mortgage. Sisson knew that I was selling these sheep.

Redirect:

There was a first and a second mortgage on the sheep. I didn't feel that I could make any sale without conferring with the parties holding these mortgages, so when the sale was made I would confer with the Arizona Central bank and with Sisson, so they were both aware that these sales were made.

F. W. SISSON, sworn as a witness on behalf of the Arizona Lumber & Timber Co., testified as follows:

I am the treasurer of the Arizona Lumber Co, and held the same position in 1890, '91, '92, '93, and '94. I was present at the Arizona Central bank with Hoskins, Fulton, and Vories on January 3rd, 1893. There was a discussion in regard to the amount of Fulton's indebtedness to the bank. Hoskins first claimed that there was due $6,300.00 or $6,500.00. He then stated there was only $4,800.00 due. I asked for an explanation, and after some discussion it developed that there was one note for $400.00 and another for
141 $1,100.00 that were not properly included in the indebtedness which was claimed under the collateral mortgage. As a result, Hoskins gave a written statement acknowledging indebtedness to only forty-eight hundred dollars, and in return I executed on behalf of the Arizona Lumber & Timber Co. only a written statement, which was shown here, acknowledging the existence of those notes. That was all that occurred January 3rd. After those two instruments were interchanged we adjourned for that day. At that interview I obtained from Hoskins and Vories the data from which to make up the releases which they had already agreed to give on the wool clip of 1893. I took the data home with me, made up the releases the next day, and brought them with the mortgage to the bank the next day. Hoskins and Vories objected to the releases in the form they were written, because I made them read, "All wool now grown or to be grown," I claiming that they had no claim on the wool whatsoever. They were not satisfied, on account of the mixing up of the securities, to make that kind of a release. They said they wouldn't sign the release in that shape, but would sign it if we would limit it to the wool clip of 1893, and I agreed to that, and the releases were executed subject to the wool clip of 1893 being released. This was the only question that came up in regard to the releases, and they were separate and distinct.

142 Q. What consideration for these releases was given on your part?

A. No consideration.

COUNSEL FOR PLAINTIFF-: I move to strike it out.

By the COURT: Strike it out.

To which ruling of the court the defendant- then and there duly objected and excepted.

Witness continues:

I included in that mortgage three hundred and twenty acres of ranch property called "Mountain ranch." Hoskins seriously objected to that property going into the mortgage, and finally, after a good deal of discussion, it was stricken out. I was not representing the Riordan Mercantile Co. at that time in any capacity, nor was anything whatever said about the Riordan Mercantile Co. In July, 1892, the Riordan Mercantile Co. took a mortgage and note for five thousand dollars on Fulton's sheep. That note, in September, 1892, was sold to the Arizona Lumber & Timber Co. The Riordan Mercantile Company continued to deal with Fulton from July to the latter part of December, during which time he had opened an account with the Riordan Mercantile Co., accumulating something over $3,000.00. Before this mortgage was made the balance that Fulton was owing to the Riordan Mercantile Co. was assigned for value to the Arizona Lumber & Timber Co. At the time the mortgage was made the lumber company was the sole owner of the notes against

143 Fulton. There was no intimation of any kind by anybody that there was anything to do with any one except the Arizona Lumber & Timber Co. on January 3rd or 4th. The mortgage and releases were executed on January 4th. There was not a dollar of indebtedness to the Riordan Mercantile Co. at that time. The transfer had been made a few days prior to that. The Riordan Mercantile Co.'s mortgage of July, 1892, was released after the mortgage to the lumber company of January 4th, 1893, was executed. At that time the whole indebtedness of Fulton was to the Arizona Lumber & Timber Co. There never had been prior to that time any notes or mortgages to the Arizona Lumber & Timber Co. The drafts were made on the Riordan Mercantile Co. At the conversation at the bank, January 3rd and 4th, there was not a single word said in regard to the foreclosure of the mortgages nor about forbearing to foreclose. Hoskins and Vories objected to the form of the mortgage which I had drawn up, for the reason that it contained no reference to their mortgages. There was not any agreement nor the slightest word between myself, Vories, and Hoskins at that time other than was put in writing by the parties. The receipt which you show me (Plaintiffs' Exhibit 4) was given at the time Fulton turned over to the Arizona Lumber & Timber Co. $3,000.00 of his wool clip of 1893. It was made by the book-keeper, as it shows, and signed by me. The receipt is simply an error in so far as the signature of the Riordan Mercantile Co. is concerned.

144 We have a receipt stub book for each company, and the book-keeper simply made a mistake and made it out on the Riordan Mercantile Company's blank, and I did not notice it and signed it. At the time the receipt was given there was not a dollar due the Riordan Mercantile Co., nor was any amount paid by Fulton to the Riordan Mercantile Co. This note which you hand me, for $8,885.00, was secured by the mortgage made in favor of the

Arizona Lumber & Timber Co., dated January 4th, 1893. There is due upon it at this time $418.48.

Here the note was offered in evidence and is as follows:

$8,885.00. FLAGSTAFF, ARIZ., *Dec.* 31, 1892.

Six months after date, without grace, I promise to pay to the Arizona Lumber & Timber Company or order the sum of eight thousand eight hundred and eighty-five dollars, for value received, with interest thereon at the rate of one and one-half per cent. per month from date until paid; principal and interest payable in current funds of the United States, at the office of the Arizona Lumber & Timber Company, Flagstaff, Arizona, without notice and protest.

I hereby waive and relinquish all right to exemption of any property I may have from execution on this debt. I further agree if this note is collected by suit to pay ten per cent. of face for attorney fees.

No. 321. HARRY FULTON.

145 (Endorsed.)

"Pd. Feb. 8, '93	$205	39
Jan. 16, '93	5	40
Apr. 21, '93	3,000	0000.00
Aug. 30, '93	5,000	00
	8,210	79
Wool, 4, 15, '94	1,250	00
	$9,460	79

$8,885	00
893	10
105	17
9,883	27
9,460	79
418	48"

On the 18th of December, 1893, I was treasurer of the Riordan Mercantile Co. The Riordan Mercantile Company at that date was plaintiff in the action against Fulton.

Here the attorney for the Riordan Mercantile Company offered in evidence the writ of attachment in the case of Riordan Mercantile Co. against Fulton, which is as follows:

146 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Coconino.

RIORDAN MERCANTILE COMPANY, Plaintiff,
vs.
HARRY FULTON, Defendant.
} Writ of Attachment.

The Territory of Arizona to the sheriff of Coconino county, Greeting:

We command that you attach forthwith so much property of Harry Fulton, if to be found in your county, on security as shall be of value sufficient to make the sum of eight hundred ten and $\frac{91}{100}$ dollars and the probable costs of suit, to satisfy the demands of Riordan Mercantile Company, and that you keep and secure in your hands the property so attached, unless replevied, that the same may be liable to further proceedings thereon, to be had before the court, and that you make return of this writ showing how you executed the same.

Given under my hand, with the seal of the said district court, at Flagstaff, Arizona, this 18th day of December, A. D. 1893.

[SEAL.] OSCAR GIBSON, *Clerk.*

147 (Endorsed:) No. —. Writ of attachment. In the district court of the fourth judicial district in a/d for the county of Coconino, Territory of Arizona. R. M. Co., plaintiffs, *vs.* Harry Fulton, defendant. Filed January 5th, 1894. Oscar Gibson, clerk. —— ——, deputy.

(Endorsement on back showing sheriff's return as per next page.)

OFFICE OF THE SHERIFF OF
COCONINO COUNTY, ARIZONA.

I hereby certify that on the 18th day of December, 1893, I levied an attachment on the following property of Harry Fulton, to wit:

Ewes, hole in left ear and split in right	2,926
Wethers, hole in right ear and split in left	900
Lamb wethers, hole in right ear and split in left ear; lamb ewes, hole in left ear and split in right	1,287
Merino and breed sheep	118
Total	5,231

Horses and mules, to wit, Dan, Beauty, Bly, Pearl, Zip, Circus, Comanche, Burro, Pony, Pete, and Jennie (mules), all branded IF on the left hip; 1 Berkshire boar, one hog-house, three sheep corrals, with chutes and catch-pens; one horse corral, one hog yard, one
148 sheep dipping vat, one cook-stove, five chairs, several stools, tin pots, pans, cups, plates, knives and forks, two lamps, two farm wagons, 2¾ and 3 inch; 2 sets double harness; and I further certify that the above-described property is located about 150 yards

south of the station-house, at Cañon Diablo, A. T., and in my custody at this date.

Dec. 30th, 1893.

J. J. DONAHUE,
Sheriff of Co. Co.,
Per ASHURST.

In the District Court of the Fourth Judicial District.

To —— ——:

By virtue of an attachment issued out of the district court of the fourth judicial district, county of Coconino, Territory of Arizona, and to me directed against the within-named defendant, I attach all moneys, effects, and credits in your hands or under your control belonging to said defendant, or so much thereof as will satisfy said plaintiff's claim, to wit, — dollars, with costs and accruing costs. Please furnish statement.

Witness my hand this — day of ——, A. D. 189–.

—— ——, *Sheriff.*

I hereby certify that I received the attached writ of attachment on the 18th day of December, 1893, and that under and by virtue of the same I did levy upon and attach all the right, title, and interest of the above-named Harry Fulton in and to the following-described personal property by taking the actual and exclusive
149 possession of same:

2,926 ewe sheep, marked hole in left ear, split in right ear.

900 wether sheep, marked hole in right ear, split in left ear.

1,287 lambs; ewe lambs marked hole in left ear, split in right ear; wether lambs marked hole in right ear, split in left ear.

118 rams.

9 horses, branded HF on left hip, namely, Dan, Beauty, Bly, Pearl, Zip, Circus, Comanche, Pony, Burro.

2 mules, branded HF on left hip, namely, Pete and Jennie.

1 thoroughbred Berkshire boar.

1 thoroughbred Berkshire sow.

L farm wagon, 2¾-inch.

1 " " 3-inch.

2 sets double harness.

1 sheep dip-vat.

1 cook-stove, 5 chairs, 5 stools; cooking outfit, consisting of pots, pans, plates, cups, knives and forks; two lamps.

1 stone camp-house.

1 stone and lumber dwelling.

1 frame stable.

1 frame buck-house.

1 stone hog-house.

3 lumber sheep corrals, with chute and catch-pens.

1 lumber horse corral.

1 lumber hog yard.

I further certify that the above-mentioned stock is on its
150 accustomed range, in my possession, near Cañon Diablo, Arizona, and that the remainder of the above-mentioned property is located about 150 yards south of the station-house at Cañon Diablo, Arizona, and is also in my possession.

Dated March 16th, 1894.

J. J. DONAHUE,
Sheriff of Coconino County, Arizona.

Witness continues:

The sheep attached in this action *was* sold by the sheriff and bought in by the Riordan Mercantile Co. at the sheriff sale, and are still in the possession of the Riordan Mercantile Co.

Cross-examination by plaintiffs.

(By ATTORNEY FOR PLAINTIFFS:)

Q. Whom are you representing now in this case? Are you a representative of both companies?

Objected to by attorney for the Arizona Lumber & Timber Co. as incompetent, irrelevant, and immaterial; which objection the court overruled, and the said defendants then and there duly excepted to such ruling by the court, and the witness answered:

A. Yes, sir; both companies this time. The papers show that both are here.

Witness continues:

I was present January 3rd at the bank. I did not say
151 then, "I am here as treasurer of the Arizona Lumber & Timber Co. and not as treasurer of the Riordan Mercantile Co." The lumber company is known as the mill company. Nothing was said there in that conversation about the Riordan Mercantile Co. formerly having a mortgage on the sheep, and that was to be merged into that mortgage. Some time previous to that I said to Vories that I was going to release that mortgage. I did afterwards release the Riordan Mercantile Company's mortgage, and did include that debt in this mortgage given to the Arizona Lumber & Timber Co., but the lumber company was the owner of it, and had been for several months. I did not state in that conversation, nor had I an occasion to state, that the lumber company had taken an assignment in good faith for value received. No one questioned but that it was simply the lumber company alone. I did take a new mortgage in the name of the Arizona Lumber Company. This insertion made in that mortgage on January 3rd was written and shown to me before it was put in the mortgage, and I submitted to it. I signed the mortgage—that is, signed the affidavit to the mortgage—as treasurer of the Co. That release of the Riordan Mercantile Co. was made on the fifth of January. On the third of January that mortgage was owned by the Arizona Lumber & Timber Co. Perhaps it was not released by the proper party. It saved extra

work—the filing of a separate instrument; that is all. As I
152 understand it, the release of the lumber company would have had to show that they were the owners of the paper, and a separate instrument would be required setting forth that fact, which would have to be recorded. The stockholders of the two companies are not practically the same. D. M. Riordan is president of both companies. I am treasurer of both companies.

Witness shown Plaintiffs' Exhibit 3.

Fulton asked for a statement, and this paper, I suppose, was sent him in answer to his request, but it contains no date, no name, or anything. The paper is in my handwriting, I think. This paper purports to be a statement up to January first, 1894. I think it is a correct statement. There is only one company. The receipt mentioned as being given by the Riordan Mercantile Co. is error.

Exhibit 5 shown to witness.

My name here is in my signature. There are two credits here of wool; one credit for some small item that was due Fulton, I think. There is about $418.00 due on the note of January 4th, 1893, due the Arizona Lumber & Timber Company. There has been credited on this note about $1,250.00 for wool taken from the sheep since they were sold.

153 Examination by attorney for Northwestern National bank:

On this statement the note at the bottom for $5,000.00 is meant the note made by Fulton on the 30th of August, 1893, and sold to the Northwestern National bank. The words in this statement "this note discounted," that means the note which Fulton made August 30th, 1893, in favor of the Arizona Lumber & Timber Co. At the time this statement was made, the Arizona Lumber & Timber Co. did not own this note. This statement, as I understand it, was made January first. They didn't have the note in their possession at that time. I simply included that note in the statement for explanation to Fulton. This note had been protested at that time. Fulton wanted to know his total indebtedness. This was discounted in Chicago, September 29th, 1893. I mean by "discounted" that the note was sold at that time, was sold to the Northwestern National bank.

C. H. Coble, a witness for defendant Arizona Lumber & Timber Co., sworn, and testified as follows:

On April 21st, 1893, I was book-keeper for the Arizona Lumber & Timber Co.

Plaintiffs' Exhibit 4 shown to witness.

154 This exhibit is in my handwriting. It was written on a Riordan Merchantile Company's blank in error. It should have been on the Arizona Lumber & Timber Company's blank. I kept both receipt books in the same drawer, and it was a mistake

that I got this one. The books of the Arizona Lumber & Timber Company will show the credit. I am book-keeper for two companies, if there are two companies. I keep whatever books there are. The Riordan Merchantile Company have books also.

Plaintiffs' Exhibit 3 is shown witness by attorney for plaintiffs.

I don't know anything about that statement. I didn't make it up. I do not keep two separate accounts with Fulton nor in behalf of one company and one for the other company. His account is now kept with the Arizona Lumber & Timber Company. I don't remember when I commenced carrying all of his account with the Arizona Lumber & Timber Company. I think I commenced that after January 3, 1893. The account up to that time was all assigned to the Arizona Lumber & Timber Co. I do not recollect how much was endorsed on the account after the sale of the wool from the Fulton sheep. There may be a credit I don't know. I have been book-keeper for the company, yes, sir. I don't know how many accounts we have there. I should say about four or five hundred. I don't know how long Fulton has been on the books, and I can't tell exactly when the accounts were transferred from one book to
155 the other. I remember this error because the books show it to be error. The $3,000.00 is credited in the Arizona Lumber & Timber Company's books. Sisson didn't tell me to look it up. He told me this morning about it and I looked it up. I didn't know of the mistake until I looked it up.

F. W. Sisson, recalled for the defendant The Arizona Lumber & Timber Co., testified as follows:

The Arizona Lumber & Timber Company and the Riordan Mercantile Co. are separate companies in everything. The stockholders are not the same, nor are the directors or the officers the same. The two companies have different sets of books. Since January first, 1894, the Riordan Mercantile Company has been out of business, and they have no books now. On January 3rd and 4th, 1893, there were two book-keepers and two sets of books.

Cross-examination by plaintiffs:

The Riordan Mercantile Co. have not been transacting business since the first of January, 1894, except collecting some of their accounts.

Q. At the time you took this mortgage, on January 3rd, you knew about all Fulton had—you took about all Fulton had?

156 Objected to by attorneys for defendants except Vories as incompetent and improper cross-examination. The court overruled the objection; to which ruling of the court the defendants then and there excepted, and the witness answered:

A. You mean including the mortgage?
Q. You were acquainted with Fulton's resources at that time?
A. Somewhat.

Q. Weren't you pretty well acquainted with Fulton's resources?
A. Probably.
Q. At the time the mortgage was taken, the mortgage held by the Northwestern National bank, on July 30th, you knew all the money that he could get into his hands from all resources?
A. No.
Q. Didn't you have a mortgage on his wool and everything like that?
A. Yes, sir.
Q. Didn't you know about what money he had or was receiving?
A. No.
Q. Did you know of any he received that you didn't get?
A. Yes, sir,
Q. What was it?
A. I don't know how much. I know he had some money I didn't know anything about.

157 Examination of the witness F. W. Sisson by the attorney for the Northwestern National bank:

Hands to witness note marked Defendants' Exhibit "D."

The signature on the back of this note in the name of D. M. Riordan was made by Mr. Riordan himself, and my name was written by me. It is my signature.

(Note offered in evidence, and the protest of Mr. E. J. Babbitt; which note and protest are as follows:)

(*Note.*)

5,000 bal. FLAGSTAFF, ARIZONA, *Aug.* 30, 1893.

90 days after date, waiving grace, notice, and protest, for value received, I promise to pay to Arizona Lumber & Timber Co. or order the sum of six thousand dollars, with interest thereon, at the rate of one and one-half per cent. per month, from date until paid, principal and interest payable in gold coin of the United States of the present standard, at the office of the Arizona Lumber & Timber Co., Flagstaff, Arizona.

#349. 61160. HARRY FULTON.

Due Nov. 28.

(Endorsed:) Paid one thousand dollars Aug. 31, '93. Pay to the order of Northwestern National bank, Chicago, Ill. Arizona Lumber & Timber Company, by D. M. Riordan, pres't; F. W.
158 Sisson, treas. For collection and remittance account of Northwestern National bank, Chicago, Ill. F. W. Gookin, cashier.

(Copy.)

(*Protest.*)

$6,000.00. FLAGSTAFF, ARIZONA, *Aug.* 30, 1893.

90 days after date, waiving grace, notice, and protest, for value received, I promise to pay to Arizona Lumber & Timber Co. or order the sum of six thousand dollars, with interest thereon, at the rate of one and one-half per cent. per month, from date until paid, principal and interest payable in gold coin of the United States of the present standard, at the office of the Arizona Lumber & Timber Co., Flagstaff, Arizona.

349. HARRY FULTON.

(Endorsed:) Paid one thousand dollars Aug. 31, '93. Pay to order of Northwestern National bank, Chicago, Ill. Arizona Lumber & Timber Company, by D. M. Riordan, pres't; F. W. Sisson, treas.

TERRITORY OF ARIZONA, } *ss:*
County of Coconino, }

Be it known that on the 28th day of November, in the year of our Lord eighteen hundred and ninety-three, at the request
159 of the Northwestern National Bank of Chicago, Ill., I, E. J. Babbitt, a notary public duly admitted and sworn, dwelling in Flagstaff, county of Coconino and Territory aforesaid, presented the original promissory note, of which the above is a true copy, at the office of the Arizona Lumber & Timber Company of Flagstaff, Arizona, and demanded payment thereof; that the maker of said note, Harry Fulton, was not to be found at said place where said note is payable, nor in the town of Flagstaff, although I made diligent search for him.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker and endorser of the said promissory note.

And I, the said notary, do hereby certify that on the same day and year above written I deposited in the post-office in the said Flagstaff notice of the foregoing protest, written, signed by me, and folded in the form of letters as follows, viz:

Notice for Arizona Lumber & Timber Company; directed to Flagstaff, Arizona, being their respective reputed places of residence and nearest post-office thereto; and, further, that on the day and year last aforesaid I served like notices of the foregoing protest, as follows, viz:

160 Notice for Arizona Lumber & Timber Company; served on said company by delivering same to F. W. Sisson, treasurer thereof, who acknowledged receipt thereof.

In witness whereof I have hereunto subscribed my name and affixed my seal of office, at Flagstaff aforesaid, this 28th day of November, A. D. 1893.

[SEAL.]

In testimonium veritates.

(Signed) E. J. BABBITT,

[SEAL.] *Notary Public.*

This note was assigned to the Northwestern National bank on the 29th of September, 1893. The transaction was had in the city of Chicago, in the State of Illinois, in the room of the Northwestern National bank. The consideration paid for the note was the full value, except they discounted the interest, charging only seven per cent. interest. The amount received by the Arizona Lumber & Timber Company from the Northwestern National bank for this note was five thousand one hundred and sixty-one dollars. Mr. Riordan signed his name to this endorsement here, at Flagstaff. I signed the endorsement at Chicago. I told those parties representing the Northwestern National bank that Fulton was an honest man, and that the note would be paid. The president of the bank knew Fulton and knew his father. I did not have the chattel mortgage with me which secures this note. I couldn't take it
161 from the recorder's office. I did not have a copy of that with me.

(By ATTORNEYS FOR PLAINTIFFS:)

Q. You never executed a formal assignment of the mortgage, did you, at that time?

Objected to by defendant Northwestern National Bank as immaterial and not necessary for the mortgage to be assigned; the assignment of the debt carries the mortgage; which objection was overruled by the court; to which ruling said defendant then and there excepted, and the witness answered:

A. No, sir.

Examination continued by attorney for Northwestern National bank:

I told these parties that the note was secured by a first chattel mortgage; that it was a first mortgage on six thousand sheep. I made no other statement to them about any other mortgage (interrupted by attorney for plaintiffs)——

Q. You told them it was the first mortgage?

A. On six thousand sheep.

Q. You had a mortgage prior to that, didn't you?

A. We had a mortgage; yes, sir.

Q. Wasn't it prior to the date of that?

A. Yes, sir.

Q. Didn't it cover all the sheep that Fulton had on the 3rd of January?

A. Yes, sir.

Q. Then you lied when you told that?
A. No; I did not.
Q. I would like to have you explain it.
A. I don't have to explain it. Under the conditions which existed at that time I didn't consider that the mortgage which the Arizona Lumber & Timber Company holds was a first mortgage on those sheep.

By ATTORNEY FOR PLAINTIFFS: Move to strike it out.
By the COURT: Strike it out.

To which ruling of the court in striking out the last answer of this witness attorney for this defendant The Northwestern National Bank duly objected and excepted.

Here defendant Northwestern National Bank introduces in evidence, subject to the objection of plaintiff and defendant Vories, the mortgage securing said note; a certified copy of which mortgage, marked Exhibit "E," is attached to the amended complaint in this case and is considered incorporated in this bill of exceptions as fully as if written out at length herein.

Thereupon, the evidence being concluded, counsel for defendant Northwestern National Bank moved the court to strike out from the evidence and record in the case all testimony, so far as this defendant is concerned, of any agreement or contract made on the outside between the Arizona Central bank and Mr. Vories and the Arizona Lumber & Timber Company and Fulton, because
163 such evidence is immaterial to any issue connected with this defendant and is not binding upon this defendant, nor was this defendant a party to the same, nor had *he* any knowledge of it; which motion the court overruled; to which ruling this defendant then and there excepted.

Thereupon the said defendant further moved to strike from the records, so far as this defendant is concerned, the two mortgages introduced as evidence by plaintiffs and defendant Vories, marked Exhibits "A" and "B" and attached to the amended answer, because said mortgages are void for uncertainty in the description of the property; which motion the court overruled; to which ruling this defendant then and there excepted.

Thereupon this defendant further moved to strike out from the record all evidence of and the mortgage itself, marked Exhibit "C" and attached to the original complaint, being the mortgage given January, 1893, because said mortgage contains an agreement or contract incorporated therein which cannot bind this defendant and which has no connection with the issues in this case. The motion was overruled by the court; to which ruling this defendant then and there excepted.

The evidence being concluded, the court thereupon renders its decision and judgment in favor of plaintiff and defendant Voris and against the other defendants; and thereafterwards, to wit, on the 22nd day of August, 1894, and within two days after said judgment

and decision, the defendants Arizona Lumber & Timber
164 Company, Riordan Mercantile Company, and The Northwestern National Bank filed their motion for a new trial in this cause; which said motion is in the words and figures following:

Comes now Arizona Lumber & Timber Company, a corporation, by E. E. Ellinwood, its attorney, and Riordan Mercantile Company, a corporation, by its attorney, E. E. Ellinwood, and The Northwestern National Bank, a corporation, by its attorneys, Herndon & Norris, defendants in the above-entitled action, and move the court to set aside the order of judgment and decision of the court entered in the above-entitled cause this 22nd day of August, 1894, and grant these defendants a new trial in this action for the following reasons and upon the following grounds, to wit:

1. That the court erred in overruling the demurrer of the defendant The Northwestern National Bank to complaint of plaintiffs.

2. For the reason that the court during the trial of said cause erred in admitting *in* evidence which was objected to by these defendants and reject*ed* evidence offered by these defendants.

3. Because the judgment and decree of the court is not supported and sustained by the evidence in the case.

4. Because the judgment and decree of the court is contrary to and not supported by the law.

5. Because the court erred in admitting in evidence, over the objections of these defendants, evidence of agreement and con-
165 tract forming no part of the mortgage sought to be foreclosed by plaintiffs, and to which the defendant Riordan Mercantile Co. and Northwestern National Bank were nor parties or privies.

6. Because the court erred in the trial of said cause in permitting the plaintiffs in this action of foreclosure or mortgage to introduce evidence tending to prove a breach of contract between plaintiff and Arizona Lumber & Timber Co., to which these defendants were not parties and the determination of which could not effect said other defendants.

7. The court erred in holding and deciding that the description of the property in plaintiffs' mortgage and in defendant John Vories' mortgage was good and sufficient.

8. The court erred in holding and deciding that the defendant The Northwestern National Bank and Riordan Mercantile Company had notice and knowledge of the alleged equities on behalf of plaintiff and between plaintiff and defendant Arizona Lumber & Timber Company.

9. The court erred in holding and deciding that the property included in the mortgage held and owned by the defendant The Northwestern National Bank is the same property included in plaintiffs' mortgage and defendant John Vories' mortgage.

10. The court erred in rendering judgment in favor of
166 plaintiffs and in favor of defendant John Vories for the foreclosure of their alleged mortgages and in holding and deciding

that these defendants' rights were subject to the alleged rights of plaintiffs and defendant John Vories.

Dated Flagstaff, Ariz., August 22nd, 1894.

ARIZONA LUMBER & TIMBER COMPANY, *A Corporation*,
By its attorney, E. E. ELLINWOOD.
RIORDAN MERCANTILE COMPANY, *A Corporation*,
By its attorney, E. E. ELLINWOOD.
THE NORTHWESTERN NATIONAL BANK, *A Corporation*,
By its attorneys, HERNDON & NORRIS.

(Endorsed:) Filed Aug. 22nd, 1894. Oscar Gibson, clerk.

Afterwards, on the 23rd day of August, 1894, and during the session of said court, said motion came on for hearing, and, after being presented to the court, was by the court overruled; to which ruling of the court the defendants Arizona Lumber & Timber Co., Riordan Mercantile Co., and The Northwestern National Bank then and there duly excepted.

Wherefore said defendants tender this their bill of exceptions, which contains all the evidence in the case, thereby avoiding the necessity of a statement of facts, and pray that the same may be settled, allowed, signed, sealed, and made a part of the record in this cause.

167

Which is accordingly done this 19th day of September, A. D. 1894.

JNO. J. HAWKINS,
District Judge.

E. E. ELLINWOOD,
Attorney for Defendants Arizona Lumber & Timber Company and Riordan Mercant-le Company.
HERNDON & NORRIS,
Attorney- for Defendant Northwestern National Bank.

The foregoing bill of exceptions was presented to us by Hon. John J. Hawkins, judge of the above-entitled court, on the 15th day of October, 1894, and we have examined the same and find that it contains all the evidence and all the facts upon the trial of said cause, and that the same is correct.

Dec. 21st, 1894.

FRED. HARRINGTON,
Attorney for Plaintiff.
H. Z. ZUCK AND
E. S. CLARK,
Attorney- for Defendant Vories.

(Endorsed:) Filed Sept. 19th, 2 p. m. Oscar Gibson, clerk; T. J. Moyer, deputy.

168 *Assignment of Errors of Arizona Lumber & Timber Company & Riordan Mercantile Company.*

Comes now the defendants Riordan Mercantile Co. and Arizona Lumber & Timber Co., corporations, and assign as error in the record and proceeding in the above-entitled cause the following:

I.

The court erred in admitting in evidence, over defendants' objection, the pretended mortgages from Fulton to plaintiffs and from Fulton to defendant Vories, marked Exhibits "A" and "B," for the reason that the description of the property attempted to be mortgaged is insufficient and so vague, indefinite, and uncertain as to render the instruments void, and for the further reason that the said mortgages do not attempt to convey all of the sheep of defendant Fulton, but a certain number out of a greater number, and there is nothing in the mortgages whereby those attempted to be mortgaged could be identified.

II.

The court erred in permitting plaintiff J. H. Hoskins, while a witness for plaintiffs, to state a conversation had between
169 F. W. Sisson, John Vories, the witness, and defendant Fulton, on January 3rd, 1893, in regard to a mortgage given by Fulton to Arizona Lumber & Timber Company, and as to certain negotiations in regard to the wool on the sheep, and as to the release thereof from plaintiffs' and Vories' mortgages and certain objections made by witness to form of mortgage, and that he could not carry Fulton any longer unless his and defendant Vories' mortgages were distinctly recognized, and as to point raised by witness that character of sheep might change from year to year, and as to release made then and there as to wool, and a certain insertion being made in said mortgage, in handwriting of Hoskins, that said mortgage was subject to certain other mortgages, and the number of sheep as described in same were to be kept good out of the increase, because said evidence tends to change description of property in the mortgages themselves, and to include in said mortgages property not named and described therein nor intended to be included therein; and, further, that it attempts to vary and change the mortgages; and, further, it is an attempt to try a pretended agreement and contract to which the defendant Riordan Mercantile Company was not a party nor privy thereto, and it undertakes to effect the attachment lien held by the defendant Riordan Mercantile Co. by such pre-
tended contract and agreement; and, further, that said pre-
170 tended contract and agreement was a distinct and independent matter, foreign to the mortgage, the breach of which could not be tried in this proceeding, because, further, the increase of the sheep were not included in the original mortgages to plaintiffs and defendant Vories, and any contract and agreement made thereafter by witness and Vories and Sisson or by Fulton, and any

insertion made in said subsequent mortgage could not add to the property or description thereof contained in the prior mortgage, nor could the same effect the rights of the defendant Riordan Mercantile Co.

III.

The court erred in denying defendants' motion to strike from the evidence and records, so far as these defendants are concerned, the two mortgages introduced in evidence by plaintiff and defendant Vories, marked Exhibits "A" and "B," for the reason that said mortgages are void for uncertainty in description of the property named therein and were therefore incompetent evidence.

IV.

The court erred in denying and overruling defendants' motion for a new trial herein, for the reasons already assigned under the above assignments and for the further reason that the judgment and decree of the court is not supported and sustained by the evidence, in this, to wit:

171 (1.) The evidence shows that the mortgage of plaintiffs covered only five thousand head of sheep, and the mortgage of defendant Vories covered only one thousand head of sheep, and at the same time said defendant, Fulton, owned sixty-two hundred head of sheep, which plaintiffs and Vories knew at the time they took their respective mortgages; that more than seventeen hundred head of those sheep had been sold and butchered by Fulton, of which plaintiffs and Vories had notice and knowledge and to which they consented, and many had strayed and died, and that at the time this action was begun there did not remain more than one thousand head of sheep owned by Fulton at the time said mortgages were given.

(2.) That there were on hand at the time the decree herein was rendered not more than one thousand head of sheep which were owned by said Fulton at the time he gave said mortgages, including the two hundred head, or part of them, which were owned in excess of the six thousand when the mortgages to plaintiffs and defendant Vories were executed, and the court held that all the sheep now on hand up to six thousand head should be sold to satisfy the mortgages of plaintiff- and Vories.

(3.) The evidence fails to show that there were twelve hundred lambs, sixteen hundred ewes, and twenty-two hundred

172 wethers, or any other number of lambs, ewes, and wethers, marked as described in plaintiffs' mortgage, nor was there any testimony as to how many of any age, sex, or character of said sheep in the band of sheep at the time the decree was rendered or at the time the mortgage to plaintiffs was given, nor was there any evidence that there were one thousand wethers and dry ewes in the band of sheep at the time the decree was rendered or the mortgage to Vories was given, nor how many wethers nor how many dry ewes.

(4.) The evidence fails to show that any of the increase of said

band of sheep was mortgaged or pretended to be mortgaged in either plaintiffs' or defendant Vories' mortgages.

(5.) The evidence shows that more than four thousand of the sheep in the band at the time the decree was rendered were not in existence at the time the plaintiffs' and defendant Vories' mortgages were given, and were not included in said mortgages.

(6.) The evidence shows that plaintiffs' mortgage was on 1,600 ewes, 2,200 wethers, and 1,200 lambs, and the defendant Vories' mortgage was on 1,000 wethers and dry ewes; and the evidence further shows that when the property was levied upon under attachment in case of Riordan Mercantile Co. against Fulton that there were in the band of sheep only 2,926 ewes, 900 wethers, 1,287
173 lambs, and 118 rams, and that there were not sufficient of wethers to make up the number described in mortgages of plaintiffs and Vories, and that there was a surplus of ewes, even if the pretended substitution had been good.

V.

The court erred in admitting in evidence, over objection of this defendant, any and all testimony in this action of foreclosure of mortgage tending to prove a breach of contract between plaintiffs and Vories and Arizona Lumber & Timber Company for failure to keep the number of sheep described in plaintiffs' and defendant Vories' mortgages good out of increase; to which alleged contract the defendant Riordan Mercantile Co. was not a party or a privy, and the determination thereof could not effect the defendant Riordan Mercantile Co., and said alleged contract formed no part of the mortgages sought to be foreclosed, nor was it a part of the chain of title to said property, nor was there any consideration for said alleged agreement and contract.

VI.

The court erred in holding and deciding that the description of the property in plaintiffs' mortgage and defendant Vories' mortgage was good and sufficient, for the reason that said description was of a certain number of sheep included within a larger number, as shown by the evidence, all of the same general character,
174 bearing the same mark, and said sheep so attempted to be mortgaged were not identified in any manner, nor were they separated or segregated from the band of sheep or apportioned to the said mortgages.

VII.

The court erred in holding and deciding that the property included in the attachment lien of the defendant Riordan Mercantile Co. is the same property included in the mortgages of plaintiffs and defendant Vories, for the reason stated in assignment number 4, and for the further reason that the Riordan Mercantile Co.'s attachment lien included all the sheep of defendant Fulton, while the evidence shows that more than four thousand of the sheep included

in the Riordan Mercantile Co.'s attachment lien were not included in said other mortgages of plaintiffs and defendant Vories.

VIII.

The court erred in holding and deciding that the Riordan Mercantile Co.'s rights and its attachment lien were subject to the alleged rights and to the alleged mortgages of plaintiffs and defendant Vories, and in holding that defendant Riordan Mercantile Co. acquired only the rights of defendant Fulton to the sheep covered by mortgages of plaintiffs and defendant Vories, because the
175 evidence showed that said mortgages of plaintiffs and defendant Vories were void for uncertainty of description of property contained therein, and for the further reason that the property mentioned in the attachment lien of Riordan Mercantile Company is not the same property as that attempted to be mortgaged to plaintiffs and defendant Vories.

IX.

The court erred in holding and deciding that the chattel mortgages of the plaintiffs and defendant Vories were mere securities for debts, and that the legal title to the said sheep remained in the defendant Fulton, and in decreeing that said sheep should be sold and the proceeds paid to plaintiffs and defendant Vories in the proportion of five dollars to plaintiffs and one dollar to Vories, because said plaintiffs and Vories did not have a joint debt nor a joint mortgage; and the court exceeded its jurisdiction in ordering this property so sold, because there was no community of interest between plaintiffs and defendant Vories and because their respective mortgages were on separate property and not on the same property, and by the decree no distinction was made in the mortgaged property, either as to the plaintiffs or as to defendant Vories or as to the property not included in either mortgage.

X.

The court erred in finding, holding, and deciding that the sheep covered by plaintiffs' mortgage consists of five thousand head
176 of sheep, marked as follows—ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear—and that one thousand more of said sheep in said mark were covered by mortgage of defendant Vories, because it was not shown how many wethers or how many ewes so marked were then in existence, nor what kind, age, sex, and character were then in existence that were attempted to be mortgaged to plaintiffs and defendant Vories.

XI.

The court erred in holding and deciding that the defendants Riordan Mercantile Company and Arizona Lumber & Timber Co. had actual notice of the property covered by the alleged mortgages of plaintiffs and defendant Vories, for the reason that it was impos-

sible for either the plaintiffs or defendants or any one else to know from description in mortgages what property was covered thereby, and there is no evidence of knowledge from any other source, and there is no evidence that any one at any time knew what property was covered.

XII.

The court erred in deciding that F. W. Sisson, as treasurer of defendant Riordan Mercantile Co., agreed for said defendant that the sheep as described in mortgages of plaintiffs and defendant
177 Vories should be kept good out of increase, and that he was released to said defendant Riordan Mercantile Co. in consideration thereof, and that the alleged forebearance to foreclose was a consideration to said defendant, for the reason that the evidence shows that said defendant Fulton was not indebted to defendant Riordan Mercantile Co. at that time, and that said defendant Riordan Mercantile Co. was not a party or privy to the pretended agreement between plaintiffs, defendant Vories, and defendant Arizona Lumber & Timber Co.; and, further, that written releases of wool were made to defendant Arizona Lumber & Timber Co., and the evidence does not show that the defendant Riordan Mercantile Co. received any consideration of any kind at any time from plaintiffs and defendant Vories.

XIII.

The court erred in finding and decreeing that on the date of the decree the mortgage of plaintiffs covered 5,000 sheep of the Fulton mark, and the mortgage to Vories covered 1,000 sheep of the Fulton mark, for the reason that the evidence shows that there were in the band on the day of the decree not more than 1,000 sheep which were in existence on the day of the execution of the mortgages of plaintiffs and defendant Vories; and the decree attempts to
178 substitute 5,000 increase sheep, and that regardless of whether they were ewes, wethers, or lambs, to make good shortage in specific numbers of ewes, wethers, and lambs described in mortgages of plaintiffs and defendant Vories.

XIV.

The court erred in finding and holding such pretended substitution good as to defendant Riordan Mercantile Co. for the reason that it was not a party or privy thereto; also for the reason that the property attempted to be substituted could not be held under the mortgages of plaintiffs and defendant Vories, and for the reason that the property attempted to be substituted was never identified, separated, or segregated, and no way was suggested for distinguishing said property, when the description was of certain increase, without giving number, age, sex, or character, out of a larger number of increase of the same kind, no attempt being made to substitute all of said increase and no attempt to distinguish between those of plaintiffs and those of defendant Vories or between those of either or both of these and others of said increase; and, further, that no

possession was ever taken by plaintiffs or defendant Vories of property pretended to be substituted, nor was there any contract of substitution between plaintiffs and defendant Vories and de-
179 fendant Fulton, nor any consideration to defendant Fulton for any substitution, nor was any substitution ever made.

(Endorsed:) Filed this 31st day of December, 1894. Oscar Gibson, clerk.

180 *Assignment of Errors by Defendant Northwestern National Bank.*

Comes now the defendant The Northwestern National Bank, a corporation, and assign- as error in the record and proceeding in the above-entitled cause the following:

I.

The court erred in overruling this defendant's demurrer to plaintiffs' complaint for the reason that plaintiffs' mortgage sought to be foreclosed was and is void as against this defendant, and the property pretended to be mortgaged and conveyed thereby was so indefinitely described that same could not be identified, it appearing upon the face of the complaint that the property mentioned in plaintiffs' alleged mortgage was a certain number of sheep contained within a larger number, not particularly identified or distinguished from the larger number.

II.

The court erred in admitting in evidence, over defendant's objection, the pretended mortgages from Fulton to plaintiffs and from Fulton to defendant Vories, marked Exhibits "A" and "B," for the reason that the description of the property attempted to be mort-
181 gaged is insufficient and so vague, indefinite, and uncertain as to render the instruments void, and for the further reason that the said mortgages do not attempt to convey all of the sheep of defendant Fulton, but a certain number out of a greater number, and there is nothing in the mortgages whereby those attempted to be mortgaged could be identified.

III.

The court erred in permitting J. H. Hoskins, while a witness for plaintiffs, to state a conversation had between F. W. Sisson, John Vories, the witness, and defendant Fulton on January 3rd, 1893, in regard to a mortgage given by Fulton to Arizona Lumber & Timber Co., and as to certain negotiations in regard to the wool on the sheep, and as to the release thereof from plaintiffs' and Vories' mortgages and certain objection made by witness to form of mortgage, and that he could not carry Fulton any longer unless his and defendant Vories' mortgages were distinctly recognized, and as to release then and there made as to wool, and a certain insertion being made in said mortgage in handwriting of Hoskins that said mort-

gage was subject to certain other mortgages and the number of sheep as described in same were to be kept good out of the increase, because said evidence tends to change description of property in the mortgages themselves and to include in said mortgages prop-
182 erty not named and described therein nor intended to be included therein; and for the further reason that such testimony is hearsay as to this defendant; and, further, that it attempts to vary and change the mortgages; and, further, it is an attempt to try a pretended agreement and contract of which this defendant had neither notice nor knowledge and was not a party nor privy thereto, and it undertakes to control the mortgage held by this defendant by such pretended contract and agreement and thereby bind this defendant; and, further, that said pretended contract and agreement was a distinct and independent matter, foreign to the mortgage, the breach of which could not be tried in this proceeding, because, further, the increase of the sheep were not included in the original mortgages to plaintiffs and defendant Vories and any contract or agreement made thereafter by witness and Vories and Sisson or by Fulton and any insertion made in said subsequent mortgage could not add to the property or description thereof contained in the prior mortgage, nor could the same effect the rights of this defendant.

IV.

The court erred in permitting witness John Vories to testify, over objection of this defendant, as to conversation between witness and Sisson that the Vories mortgage was not a matter of record, and that Sisson stated that they had full knowledge and accepted it as a prior lien to their mortgage, and that when the change was
183 made he would allow witness to record his mortgage first, and for that reason witness declined to foreclose his mortgage, because said conversation and understanding between witness and Sisson were hearsay as to this defendant, who was not a party to same and had no notice or knowledge thereof.

V.

The court erred in permitting the witness Fulton to testify, on cross-examination by attorney for defendants Arizona Lumber & Timber Company and Riordan Mercantile Company, over objection of this defendant, as to conversation had between Sisson, Vories, and Hoskins January 3rd, 1893, and as to release of wool by Hoskins and Vories and their forbearing to foreclose, for the reason that such testimony is incompetent and immaterial and is undertaking to prove a contract or agreement between these parties in which this defendant was not interested and of which it had no knowledge.

VI.

The court erred in striking out that part of the testimony of F. W. Sisson on cross-examination, on motion of attorney for plaintiff, when he, in answer to said attorney's question to explain how

he did not lie when he told the Northwestern National bank that the mortgage which the Arizona Lumber & Timber Co. assigned to them was a first mortgage on six thousand sheep when the
184 Arizona Lumber & Timber Co. had another mortgage prior to that which showed on the record as covering all the sheep. In answer to that question the witness said, "Under the conditions which existed at that time, I didn't consider that the mortgage which the Arizona Lumber & Timber Company holds was a first mortgage on these sheep." This answer of the witness the court, on motion of plaintiffs' said attorney, struck out, and we assign such ruling as error, because, first, the question asked by attorney was impertinent and improper; second, because the answer was responsive to the question and was material to this defendant and tended to disprove the allegations of plaintiffs that this defendant took said note with knowledge of plaintiffs' pretended equities.

VII.

The court erred in denying this defendant's motion to strike from the evidence all testimony, so far as this *plaintiff* is concerned, of any agreement or contract made between plaintiff- and Vories and the Arizona Lumber & Timber Co. and Fulton concerning substituting increase of sheep to keep number good, because such evidence is immaterial to any issue connected with this defendant and is not binding upon it, and it was not a party to same, nor had it any knowledge thereof.

185 VIII.

The court erred in denying defendant's motion to strike from the evidence and records, so far as this defendant is concerned, the two mortgages introduced in evidence by plaintiff- and defendant Vories, marked Exhibits "A" and "B," for the reason that said mortgages are void for uncertainty in description of the property named therein and were therefore incompetent evidence.

IX.

The court erred in denying and overruling defendant's motion for a new trial herein for the reasons already assigned under the above assignments excepting assignment one, and for the further reason that the judgment and decree of the court is not sustained and supported by the evidence in this, to wit:

(1.) The evidence shows that the mortgage of plaintiff- covered only five thousand head of sheep, and the mortgage of defendant Vories covered only one thousand head of sheep, and at the same time said defendant Fulton owned sixty-two hundred head of sheep, which plaintiffs and Vories knew at the time they took their respective mortgages; that more than seventeen hundred head of these sheep had been sold and butchered by Fulton, of which plaintiffs and Vories had notice and knowledge and to which they consented, and many had strayed and died, and that at the time this

action was begun there did not remain more than one thousand head of said sheep owned by Fulton at the time said mortgages were given.

186 (2.) That there were on hand at the time the decree herein was rendered not more than one thousand head of sheep which were owned by Fulton at the time he gave said mortgages, including the two hundred head or part of them which were owned in excess of the six thousand when the mortgages to plaintiffs and defendant Vories were executed, and the court held that all the sheep, up to 6,000 head, now on hand and included within this defendant's mortgage should be sold to satisfy the mortgages of plaintiffs and Vories.

(3.) The evidence fails to show that there were twelve hundred lambs, sixteen hundred ewes, and twenty-two hundred wethers, or any other number of lambs, ewes, and wethers, marked as described in plaintiffs' mortgage, nor was there any testimony as to how many, of any age, sex, or character, of said sheep in the band of sheep at the time the decree was rendered or at the time the mortgage to plaintiffs were given, nor was there any evidence that there was one thousand wethers and dry ewes in the band of sheep at the time the decree was rendered or the mortgage to Vories was given, nor how many wethers nor how many dry ewes.

(4.) The evidence fails to show that any of the increase of said band of sheep was mortgaged or pretended to be mortgaged in either plaintiffs' or defendant Vories' mortgages.

(5.) The evidence shows that more than four thousand of
187 the sheep in the band at the time the decree was rendered were not in existence at the time plaintiffs' and defendant Vories' mortgages were given and were not included in said mortgages.

(6.) The evidence shows that plaintiffs' mortgage was on 1,600 ewes, 2,200 wethers, and 1,200 lambs, and the defendant Vories' mortgage was on 1,000 wethers and dry ewes, and the evidence further shows that when the property was levied upon under attachment in case of Riordan Mercantile Company *vs.* Fulton that there were in the band of sheep only 2,926 ewes, 900 wethers, 1,287 lambs, and 118 rams, and that there were not sufficient of wethers to make up the number described in mortgages of plaintiff and Vories, even if the pretended substitution had been good.

X.

The court erred in admitting in evidence, over the objection of this defendant, any and all testimony in this action of foreclosure of mortgage tending to prove a breach of contract between plaintiff and Vories and Arizona Lumber & Timber Co. for failure to keep the number of sheep, as described in plaintiffs' and Vories' mortgages, good out of the increase, to which alleged contract this defendant was nor a party or a privy, and the determination thereof could not effect this defendant, and said alleged contract formed no part of the mortgages sought to be foreclosed, nor was it a part of

the chain of title to said property, nor was there any consid-
188 eration for said alleged agreement and contract.

XI.

The court erred in holding and deciding that the description of the property in plaintiffs' and Vories' mortgages was good and sufficient as against this defendant, for the reason that said description was of a certain number of sheep included within a larger number, as shown by the evidence, all of the same general character, bearing the same mark, and said sheep so attempted to be mortgaged were not identified in any manner, nor were they separated or segregated from the band of sheep or apportioned to the said mortgages.

XII.

The court erred in holding and deciding that this defendant had notice and knowledge of an alleged contract and equities in behalf of plaintiff and defendant Vories, and between plaintiffs, defendant Vories, Arizona Lumber & Timber Company, and Fulton, because there was no proff whatsoever thereof.

XIII.

The court erred in holding and deciding that this defendant's rights and its mortgage were subject to the alleged rights and to the alleged mortgages of plaintiffs and defendant Vories, be-
189 cause the evidence showed that said mortgages of plaintiffs and defendant Vories were void for uncertainty of description of property contained therein, and for the further reason that the property mentioned in this defendant's mortgage is not the same property as that attempted to be mortgaged to plaintiffs and defendant Vories.

XIV.

The court erred in holding and deciding and in so decreeing that the chattel mortgages of the plaintiffs and defendant Vories were mere securities for debts, and in decreeing that said sheep should be sold and the proceeds paid to plaintiffs and defendant Vories in the proportion of five dollars to plaintiffs and one dollar to Vories, because said plaintiffs and Vories did not have a joint debt nor a joint mortgage, and the court exceeded its jurisdiction in ordering this property so sold, because there was no community of interest between plaintiffs and defendant Vories, and because their respective mortgages were on separate property and not on the same property, and by the decree no distinction was made in the mortgaged property, either as to plaintiffs or as to defendant Vories or as to the property not included in either mortgage.

XV.

The court erred in finding, holding, and deciding that the sheep covered by plaintiffs' mortgage consists of five thousand head

of sheep, marked as follows—ewes with hole in left ear and split in right ear; wethers, hole in right ear and split in left ear—and that one thousand more of said sheep in said mark were covered by mortgage of defendant Vories, because it was not shown how many ewes or how many wethers so marked were then in existence, nor what kind, age, & character were then in existence that were attempted to be mortgaged to plaintiffs and defendant Vories.

XVI.

The court erred in finding and holding the pretended substitution good as to this defendant, for the reason that it was not a party or privy thereto and had no notice or knowledge thereof, nor was its grantor under its mortgage a party thereto; also for the reason that the property attempted to be substituted could not be held under the mortgages of plaintiffs and defendant Vories; and, further, that the property attempted to — substituted was never identified, separated, or segregated, and no way was suggested for distinguishing said property, when the description was of certain increase, without giving number, age, sex, or character, out of a larger number of increase of the same kind, no attempt being made to substitute all of said increase and no attempt to distinguish between those of plaintiffs and those of defendant Vories or between those of either or both of these and others of said increases and, further, that no possession was ever taken by plaintiff; or defendant Vories of property pretended to be substituted, nor was any substitution ever made.

(Endorsed:) Filed Dec. 31st, 1894. Oscar Gibson, clerk.

TERRITORY OF ARIZONA, }
County of Coconino, } *ss:*

I, Oscar Gibson, clerk of the district court of the fourth judicial district of the Territory of Arizona in and for the county of Coconino, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of all the records, proceedings, and files in the action lately pending in our said court, wherein B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr. (a copartnership doing business under the firm name of Arizona Central bank), were and are plaintiffs and Northwestern National Bank, a corporation; Riordan Mercantile Company, a corporation; Arizona Lumber & Timber Company, a corporation; John Vories, Harry Fulton, and J. J. Donahue, sheriff, were and are defendants, as the same appears on file and of record in my office.

Witness my hand and the seal of the said court this ninth day of January, A. D. 1895.

[SEAL.]

OSCAR GIBSON,
Clerk of the District Court of the
Fourth Judicial District of the Territory of Arizona
in and for the County of Coconino.

193 I certify that defendants Northwestern National Bank, a corporation; Riordan Mercantile Company, a corporation, and Arizona Lumber & Timber Company, a corporation, on the 18th day of December, 1894, demanded the foregoing transcript, and on the ninth day of January, 1895, I delivered the same to them.

OSCAR GIBSON, *Clerk.*

193½ [Endorsed:] No. 450. Filed Jan'y 12, '95. J. L. B. Alexander, clerk.

194 In the Supreme Court of the Territory of Arizona.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 14th day of January, 1895, said day being a judicial day of the January term, 1895, of said court:

(Title of the Court and Cause.)

It is ordered that this cause be passed temporarily.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 28th day of January, 1895, said day being a judicial day of said court:

(Title of the Court and Cause.)

It is ordered that the consideration of this cause be passed for the present.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 31st day of January, 1895, said day being a judicial day of the January term, 1895, of said court:

195 (Title of the Court and Cause.)

On motion of J. C. Herndon, for appellants, it is ordered that this cause be passed until February 12th, 1895.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 12th day of February, 1895, said day being a judicial day of the January term, 1895, of said court:

(Title of the Court and Cause.)

It is ordered that the consideration of this cause be passed until tomorrow morning.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 14th day of February, 1895, said day being a judicial day of the January term, 1895, of said court:

(Title of the Court and Cause.)

On motion of Mr. Norris, for appellants, it is ordered that appellants' time for filing brief herein be extended 20 days more.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 15th day of
196 February, 1895, said day being a judicial day of the January term, 1895, of said court:

(Title of the Court and Cause.)

On motion of Mr. Norris, for appellants, consented to by Mr. Herrington for appellees, it is ordered that the consideration of this cause be continued until tomorrow morning, and that appellee have leave to refer to certain pages of the transcript in his brief on file.

Be it remembered that the following motion to strike out appellees' brief in this cause was filed in the supreme court of Arizona on the 18th day of February, 1895, viz:

In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK *et al.*, Appellants, *vs.* ARIZONA CENTRAL BANK *et al.*, Appellees.	Motion of Appellant Northwestern National Bank.

Comes now The Northwestern National Bank, one of the appellants herein, and moves the court to strike from the files of this court the brief of the appellee Arizona Central Bank for the following reasons:

197 First. Because said brief was not filed on or before the 1st day of the present term of this court.

Second. Because said brief was not served on counsel for this appellant until long after 30 days had expired from the date of service of brief of this appellant upon said appellee.

Judgment was rendered in this case in the lower court on August 21st, 1894; September 19th, 1894, within the time prescribed by law, appellants filed bill of exceptions and statement of facts in said court, and same were presented to appellees by the judge on October 15th, 1894, but appellees delayed, neglected, and refused to sign the same until December 21st, 1894. Bill of exceptions was settled and appeal perfected as of September 19th, 1894, as provided in act of 1893 amending paragraph 828 of Revised Statutes. This appeal was therefore returnable to the present term of this court, as provided in paragraph 938 of Revised Statutes, and the transcript and brief of this appellant were duly filed with the clerk of this court before the first day of this term, in accordance with the rules of this court.

The counsel for appellee Arizona Central Bank have temporized

and delayed and have utterly failed and neglected both to file their brief on or before the first day of the present term of this court, as provided in subdivision 6 of rule III (said brief not being filed until February 9th, 1895), and also to serve upon counsel for this
198 appellant copy of their brief until long after the 30 days had expired provided in subdivision 5 of rule III.

Wherefore this appellant moves the court to strike from the files of this court the briefs of appellee Arizona Central Bank, and asks that they be considered for naught in the disposition of this case, in accordance with subdivision 8 of rule III.

HERNDON & NORRIS,
Attorneys for Appellant Northwestern National Bank.

Endorsed: No. 450. Appellants' motion to strike out appellees' brief. Filed Feb. 18, 1895. J. L. B. Alexander, clerk.

Be it remembered that the following motion to strike out appellees' brief in this cause was filed in this cause, in the supreme court of Arizona, on the 18th day of February, 1895, viz:

199 In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, RIORDAN MERCANTILE Co., and Arizona Lumber and Timber Co., Appellants,
vs.
ARIZONA CENTRAL BANK and JOHN VORIES, Appellees.
} Motion.

Comes now The Riordan Mercantile Co., one of the appellants herein, and shows to the court that judgment was rendered in the above-entitled cause in the court below on the 21st day of August, 1894 (Transcript, folio 208), and that within the time allowed by law (Trans., folio 214), to wit, on the 19th day of September, 1894 (Trans., folio 383), appellants filed their bill of exceptions and statement of facts in said court, and the same was placed in the hands of appellees by the judge on the 15th day of October, 1894 (Trans. folio 383), but that appellees refused and neglected to settle the same till the 21st day of December, 1894 (Trans., folio 383); that eleven days thereafter, to wit, on the 2nd day of January, 1895, this appellant served a copy of its brief upon attorneys for the appellee Arizona Central Bank. The appeal of appellants was perfected and bill of exceptions settled as of September 19th, 1894, in ac-
200 cordance with paragraph 828, Revised Statutes of Arizona, as amended by act of 1893. Said appeal was therefore returnable to the present term of this court, in accordance with par. 938, Revised Statutes of Arizona. The transcript and briefs of appellants were therefore duly filed with the clerk of this court before the first day of the present term, as the records of this court will show, but the appellee Arizona Central Bank utterly failed, refused, and neglected to file its brief in said court on or before the first day of

the term to which said appeal was returnable, as provided by section six of rule three of the rules of this court.

Again, said appellee, Arizona Central Bank, has failed and neglected to serve upon counsel for this appellant a copy of their brief in answer to brief of this appellant within the time prescribed by section five of rule three of this court, said brief not being filed or served until the 4th day of February, 1895.

Wherefore appellant Riordan Mercantile Company moves the court that the brief of appellee Arizona Central Bank filed February 4th, 1895, be stricken from the files of the court, and that said cause be considered and decided the same as though the appellee Arizona Central Bank had made no appearance in the case, as provided by section eight of rule three of the rules of this court.

E. E. ELLINWOOD,
Attorney for Appellant Riordan Mercantile Co.

201 Endorsed: No. 450. In the supreme court of the Territory of Arizona. Northwestern National Bank *et al. vs.* Arizona Central Bank *et al.* Motion of appellant Riordan Mercantile Co. to strike appellees' brief from files. Filed Feb'y 18, 1895. J. L. B. Alexander, clerk. Service of a copy of the within motion is hereby acknowledged this 18th day of Feb'y, 1895. Fred. Herrington, att'y Arizona Central bank.

Be it remembered that the following affidavit in support of motion to strike out appellees' brief in this cause was filed in the supreme court of Arizona on the 18th day of February, 1895, viz:

In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK *et al.*, Appellants,
vs.
ARIZONA CENTRAL BANK *et al.*, Appellees.
} Affidavit.

202 TERRITORY OF ARIZONA,
County of Coconino, } *ss:*

I, E. S. Clark, of Flagstaff, Coconino county, Arizona, being duly sworn according to law, do depose and say that on the 2nd day of January, 1895, I was duly served with a copy of a brief of the appellants Arizona Lumber & Timber Co. and Riordan M. Co. in the case of Northwestern National Bank *et al. vs.* Arizona Central Bank, appellee, now on appeal in the supreme court of this Territory, and that I was so served on and — behalf of the appellees B. N. Freeman, F. L. Kimbal, and J. H. Hoskins, Jr., doing business under the firm name of Arizona Central bank, and that I was authorized to accept service so made as aforesaid by J. H. Hoskins, Jr., one of the appellees, and by the said Hoskins authorized to sign the name of Fred. Herrington, their attorney, to said acceptance of service upon such brief, which I did, and that I thereupon and upon said date delivered said brief to the said J. H. Hoskins, Jr., appellee; that there-

after, on the 5th day of January, 1895, I accepted service of the brief of the appellant Northwestern National Bank, under like circumstances, for and on behalf of appellees Arizona Central Bank, and that I did so under and by the authority of J. H. Hoskins, Jr., and that I delivered said brief to the said Hoskins and did all
203 things in said matter at his instance and request: that the attorney for said appellees resides at Denver, Colo., and it was for this reason that the service was so made and accepted.

E. S. CLARK.

Subscribed and sworn to before me this 15th day of February, 1895.

OSCAR GIBSON,
[DISTRICT COURT SEAL.] *Clerk of the Court.*

Endorsed: No. 450. Northwestern Nat'l Bank *et al.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Affidavit to support motions of appellants. Filed Feb. 18th, 1895. J. L. B. Alexander, clerk.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 18th day of February, 1895, said day being a judicial day of said court:

(Title of the Court and Cause.)

204 It is ordered that the appellants' motion to strike out appellees' brief herein be denied and appellants The Riordan Mercantile Co. and Arizona Lumber Company be granted two days to file reply brief, and that appellant Northwestern National Bank be granted until Feb'y 24, 1895, to file reply brief herein.

Whereupon Mr. F. Herrington argued this cause on behalf of appellees and cause was submitted by appellants on the briefs now on file and to be filed as hereinbefore directed.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 18th day of January, 1896, said day being a judicial day of the January term, 1896, of said court:

(Title of the Court and Cause.)

This cause having been heretofore submitted and the court having taken the same under consideration, and the court having fully considered the same and being fully advised in the premises, it is ordered that the judgment of the lower court herein be, and the same is hereby, affirmed with costs; and it is further ordered, adjudged, and decreed that the appellees herein do have and recover of and from the appellants herein and D. M. Riordan, F. W. Sisson, and T. A. Riordan, the sureties on the appeal bond herein, the
205 sum of ten thousand four hundred and thirty-eight and $\frac{33}{100}$ dollars, with interest thereon at the rate of one and one half

per cent. per month from the 21st day of August, 1894, until paid, together with the sum of twenty-seven and $\frac{70}{100}$ dollars, costs of the lower court, and attorney fees to the amount of six hundred dollars, and the costs of this court, taxed at thirty-eight dollars.

Be it remembered that the following further proceedings were had in this cause in the supreme court of Arizona on the 18th day of January, 1895:

(Title of the Court and Cause.)

In this cause Mr. Ellinwood moved the court for findings on behalf of the appellants; whereupon the court took the matter under advisement.

Be it remembered that the following motion for rehearing was filed in this cause in the supreme court of Arizona on the 1st day of February, 1896, viz:

206 In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERcantile Company, a Corporation, and Arizona Lumber and Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, and J. H. HOSKINS, JR. (a Copartnership Doing Business under the Firm Name of The Arizona Central Bank), and John Vories, Appellees.

Motion for Rehearing.

The above-named appellants come now and move the court to grant them a rehearing of this cause in this court for the following reasons:

I.

At the time this case was submitted the court granted only 15 minutes' time for argument, and the attorney for appellant Northwestern National Bank, on account of misunderstanding, was not present, and no argument was made in behalf of said appellant, nor was the time granted by the court, of 15 minutes to a side, sufficient even to make an intelligent statement of the case, much less to argue it, and for that reason no argument could be made on behalf of appellants.

II.

207 Because after the case had been submitted to the court the attorneys for appellees filed with the clerk of the court an additional brief, without first obtaining an order of the court therefor and without serving the same upon appellants or their attorneys, which said brief was with the papers of the case and con-

sidered by the court with the other briefs on file, and which said brief the attorneys for appellants had no opportunity to answer or make a reply thereto.

III.

That the judgment of this court was rendered by a divided bench.

IV.

In rendering judgment affirming the decision of the lower court this court affirmed the action of the lower court in foreclosing the mortgages of appellees upon 118 head of rams which were not included in either of said mortgages, nor was there any pretense or showing that the same or any of them were included therein, nor were they increase of the mortgaged sheep.

V.

That this court in affirming the judgment seems to have overlooked the fact that the lower court decreed that the two chattel mortgages of appellees were mere securities for debt, and that the sheep, although different in each mortgage, should be sold together and the proceeds paid to appellees in the proportion of $5 to
208 Arizona Central bank to $1 to Vories, regardless of the specific property in each mortgage.

These two mortgages were separate, taken at different times, and upon different property; the debts were not joint nor was there a joint mortgage, and the court exceeded its jurisdiction in decreeing that this property should be so sold and the proceeds so divided.

There was no community of interest between the Arizona Central bank and Vories, but by the decree of the lower court as affirmed by this court no distinction was made in the mortgaged property to either mortgagee. We further call attention to the fact that in the court below Vories was a defendant, the Arizona Central bank having made him a defendant with appellants herein.

VI.

In affirming the judgment of the lower court this court has in effect held that appellant Northwestern National Bank had notice and knowledge of the agreement and contract between the Arizona Central bank and the Arizona Lumber & Timber Company and Vories as to the alleged agreement for substitution, but of which there was no evidence whatever as to appellant Northwestern National Bank, but, on the contrary, the proof was uncontradicted that the appellant Northwestern National Bank was a *bona fide* purchaser without notice.

209 VII.

In affirming said judgment this court seems to have overlooked the action of the lower court in holding and decreeing that all the increase of the sheep claimed to be mortgaged were subject to the

mortgages of appellees when no increase was mentioned in either of said mortgages; and, further, that Vories' mortgage called for 1,000 wethers and dry ewes, of which there could be no increase, and the proof showed that all of said number of wethers and dry ewes had died, been sold or butchered prior to this action.

VIII.

That the names of counsel for appellee Arizona Central Bank are C. E. and F. Herrington, who resides at Denver, Colorado; that the names of counsel for appellee John Vories are H. Z. Zuck, who resides at Tempe, Arizona, and E. S. Clark, who resides at Flagstaff, Arizona; that the residence of both appellees is Flagstaff, Arizona.

HERNDON & NORRIS,
Attorney for Northwestern National Bank.
E. E. ELLINWOOD,
Attorney for Arizona Lumber & Timber Co. and Riordan Mercantile Co.

210 Endorsed: No. 450. In the supreme court of the Territory of Arizona. Northwestern National Bank, a corporation; Riordan Mercantile *Mercantile* Co., a corporation, and Arizona Lumber & Timber Co., a corporation, appellants, *vs.* B. N. Freeman, F. L. Kimball, and J. H. Hoskins, Jr. (a copartnership doing business under the firm name of Arizona Central bank), and John Vories, appellees. Motion for rehearing. Filed Feb'y 1st, 1896. J. L. B. Alexander, clerk.

Be it remembered that the following proceedings were had in this cause in the supreme court of Arizona on the 4th day of May, 1896, said day being a judicial day of the January term, 1896, of said court:

(Title of the Court and Cause.)

In this cause it is ordered that the motion for rehearing filed herein by appellants be, and the same is hereby, denied.

211 And be it further remembered that the following further proceedings were had in this cause in the supreme court of Arizona on the 4th day of May, 1896:

(Title of the Court and Cause.)

In this cause notice of appeal to the United States Supreme Court was given in open court by Messrs. Ellinwood and Norris, attorneys for appellants.

In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERcantile Company, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, and J. S. HOSKINS, Copartners as the Arizona Central Bank, and JOHN VORIES, Appellees.

Application of the Above-named Appellants for an Appeal.

The above-named appellants, conceiving themselves aggrieved by the final judgment entered on the 4th day of May, 1896, in the above-entitled action and court against them, the said appellants, and in favor of the said appellees, do hereby appeal there-
212 from to the Supreme Court of the United States, and said appellants hereby pray that their said appeal be allowed, and that a citation be duly signed and issued, and that a transcript of the record, proceedings, opinion, judgment, and evidence in the case, duly authenticated, may be sent to the Supreme Court of the United States.

HERNDON & NORRIS,
E. E. ELLINWOOD AND
C. W. WRIGHT,
Attorneys for said Appellants.

And now, to wit, on the 27th day of May, A. D. 1896, the above application having been duly presented and considered, it is hereby ordered that the appeal above prayed for be allowed, and the same is hereby allowed on filing a good and sufficient bond for costs in the sum of fifteen thousand dollars.

A. C. BAKER,
Chief Justice Supreme Court of said Territory.

Endorsed: No. 450. In the supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Filed 2 day of June, 1896. J. L.
213 B. Alexander, clerk. Application for and allowance of an appeal. Charles Weston Wright, for appellants.

In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERCANTILE Company, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, & J. H. HOSKINS, Copartners as Arizona Central Bank, and JOHN VORIES, Appellees.

TERRITORY OF ARIZONA, *County of Coconino*, } *ss:*

Charles E. Howard and W. McIntire, being by me each severally sworn, on their several oaths and each for himself says that he is acquainted with the matter in dispute in the above-entitled cause, and is also well acquainted with the property involved in said suit and with its value; that the value of said property exceeds the sum of five thousand dollars, and that the judgment and decree
214 obtained by the said Arizona Central bank in said suit against said property exceeds the sum of five thousand dollars over and above interest and costs, and that the lien on said property that is in said suit claimed by said Northwestern National bank in said suit exceeds the sum of five thousand dollars over and above interest and costs of suit; that all of said property is involved in this said suit, and the issue therein between the said bank, appellant, and the said bank, appellee, is as to which of the two has the first right thereto, and that therefore affiants on their oaths say that the matter in dispute in this action, exclusive of costs, exceeds the sum of five thousand dollars.

CHARLES E. HOWARD.
W. McINTIRE.

Subscribed and sworn to before me this 2nd day of June, 1896.

C. H. BUSH,
Notary Public.

[NOTARIAL SEAL.]

Endorsed: No. 450. In supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Filed 13 day of June, 1896. J. L. B.
215 Alexander, clerk. Affidavit of amount in controversy. Charles Weston Wright, for appellants.

In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERCANTILE Company, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, and J. H. HOSKINS, Copartners as the Arizona Central Bank, and JOHN VORIES, Appellees.

It is hereby ordered and adjudged that the facts in the above-entitled case are found to be as follows, namely:

On July 10, 1890, Harry Fulton, one of the defendants in the court below, executed an alleged chattel mortgage for $7,500, payable in one year, in favor of Arizona Central Bank, one of the appellees herein and plaintiffs in the court below; that the description in said mortgage of the property purporting to be covered by it is as follows: "1,200 lambs, marked—ewes with hole in left
216 ear and split in right; wethers, hole in right ear and split in left ear; 1,600 ewes marked hole in left ear and split in right ear; 2,200 wethers marked hole in right ear and split in left ear, making five thousand sheep in all with the Fulton brand."

That on said day said Fulton executed another alleged mortgage for $4,000, payable in ninety days, in favor of John Vories, one of the appellees herein and one of the defendants in the court below; that the description in said alleged mortgage is as follows: "Wethers and dry ewes to the number of one thousand, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right."

That on said day said Fulton owned and possessed 6,200 sheep that were herded and run together, and this was all he owned, said sheep being marked as follows: "Ewes and ewe lambs, split in the right ear, hole in the left; wethers and wether lambs, reverse;" and both of the said appellees had knowledge of this fact at the time they accepted their alleged mortgages, the one on 5,000 head and the other on 1,000 head, 200 head not being included in either of said mortgages, all of said sheep having the same mark and running in the same herd and none of them being capable of identification save only by the ear-mark put on them as aforesaid, and that therefore there was no way by which any of said sheep could be distinguished from any of the others.

217 That said Fulton continued in the ownership and possession of all of said sheep, save only such as died, were sold by him, consumed, or lost, until the 18 December, 1893. At no time did appellees or either of them ever take or ever have possession of said sheep or of any of them or of the increase thereof, nor were any of said sheep or the increase thereof ever by any one identified, designated, in any way segregated, apportioned, or substituted to the or on account of the said pretended mortgages or of either thereof. From date of said mortgages (July 10, 1890) to January 4, 1893, said Fulton from time to time sold of said sheep as follows: 1,700 head, at $3 per head, that were by said Fulton accounted for and the proceeds of which he deposited with the appellee Arizona Central Bank; that both of said appellees knew of these sales and consented to them.

On January 4, 1893, said Fulton executed a mortgage for $8,885 in favor of Arizona Lumber & Timber Company, one of appellants herein and one of the defendants in the court below, covering, among other property, the following-described sheep: "About 3,000 ewes, 1,000 wethers, and 2,000 lambs, same being all the sheep now owned by mortgagor, and including all wool and increase which may be produced by said sheep, marked—ewes, split in right ear, hole in left; wethers, reverse." At the instance of appellees said appellant,

Arizona Lumber & Timber Co., permitted the following re-
218 cital to be inserted in said last-mentioned mortgage, namely:
"This being subject to a mortgage on 5,000 of above sheep to Arizona Central bank and one on 1,000 head and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase." There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear to foreclose their mortgages and should release their claim on the wool clip of 1893, the wool at that time not having been shorn.

That to August 30, 1893, $3,000 of the amount claimed to be due on the mortgage of January 4, 1893, was paid out of wool proceeds, and that on said day said Fulton, for the purpose of securing a $500 advance and applying the remainder as a payment on said mortgage of January 4, 1893, executed his negotiable promissory note, payable in 90 days, securing the same by a chattel mortgage for the sum of $6,000 to the Arizona Lumber & Timber Co.

That said mortgage was a conveyance, as a security for the payment of said note, of sheep, the same being in said mortgage described as follows, namely: "About 3,200 ewes, more or less; about 1,300 wethers, more or less; about 1,400 lambs, more or less, being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep, marked—ewes
219 and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse."

That in said last-mentioned mortgage no recital or reference was made in any way nor in any manner to the existence of any other mortgage or mortgages whatsoever.

That on the 29th day of September, 1893, and prior to the maturity of said last-mentioned note of $6,000, said appellant, Arizona Lumber & Timber Co., representing that said mortgage was a first and prior lien on said described sheep, and by means thereof sold, assigned, indorsed, and delivered said note and mortgage to Northwestern National Bank, one of the appellants herein and one of the defendants in the court below, said Northwestern National bank becoming an innocent purchaser for value.

That on December 18, 1893, said Fulton, then being indebted to Riordan Mercantile Company, one of the appellants herein and a defendant in the court below, in the sum of $810.91, it brought its action in said district court against said Fulton whereby to collect the same, and at the same time caused to be issued out of the clerk's office of said court a writ of attachment, which was then levied on the property following, namely, "all the right, title, and interest of the defendant Harry Fulton in and to the following-described sheep: 2,926 ewes, marked hole in left ear, split in right; 900 wether sheep, marked hole in right ear, split in left ear; 1,287 lambs—ewe
220 lambs marked hole in left ear, split in right; wether lambs marked hole in right ear, split in left; 118 rams," same being all of the sheep then owned by the said Fulton.

That on 16 March, 1894, judgment was rendered in said suit in favor of said plaintiff company and against said Fulton for said

amount and said attachment lien was foreclosed; that on the 31 day of March, 1894, the sheriff of said county of Coconino by virtue of and pursuant to said judgment sold said property and delivered the same to the appellant Riordan Mercantile Company, who then entered into the possession thereof, was so in the possesson thereof when this cause was tried in the lower court, and are still in the possession thereof.

That by virtue of said writ of attachment the sheriff attached all the sheep then owned by said Fulton, and that on said day, to wit, on the 18 day of December, 1893, there were of said sheep only 1,000 head of ewes remaining out of all the sheep that existed on July 10, 1890, the date of said alleged mortgages to appellees; that the remainder of said ewes, all the male sheep, and the lambs had by that time died, been consumed, sold, or lost.

That subsequent to the making of said alleged mortgages to said appellees an oral agreement between them and the said Fulton was made that the securities of appellees were to be kept good
221 out of the increase by substitution, the consideration therefor being that said Fulton might sell and dispose of the said sheep without interference from appellees.

That Sisson, a witness for appellants in this case, is and was during all of said transactions the treasurer of both The Riordan Mercantile Co. and The Arizona Lumber & Timber Co., appellants herein, and that these two corporations have practically the same officers.

That in said district court said Arizona Central Bank brought its suit as plaintiff against said Fulton, Vories, Donahue, as sheriff; The Arizona Lumber & Timber Company, The Riordan Mercantile Company, and The Northwestern National Bank, as defendants, asking for a foreclosure of its said alleged mortgage, the same being the above-entitled cause.

That said action was tried and judgment was rendered foreclosing said alleged mortgages of both of appellees herein, and also the said mortgage dated January 4, 1893, of said Arizona Lumber & Timber Company and the mortgage owned by said Northwestern National bank as aforesaid, in which said judgment said court adjudged that appellees have a prior and first lien on said property, viz., the Arizona Central bank upon 5,000 sheep of the Fulton mark by reason of its said mortgage, and the said Vories on 1,000 sheep of the Fulton mark by reason of his said mortgage; and said court decreed and ordered that an order of sale issue for the sale of all of said property to the sheriff of said county, and that the
222 proceeds arising therefrom be divided by the sheriff and applied as follows, namely, at the ratio of five dollars to said Arizona Central bank and one dollar to said Voires; that in case anything should be left after the payment of said two mortgages to said bank and Voires, the same should be applied to the payment of the judgments of said Northwestern National bank and said Arizona Lumber & Timber Company and Riordan Mercantile Company in the order named.

From this judgment and decree the said Northwestern National

bank, the Riordan Mercantile Company, and the Arizona Lumber & Timber Company appealed to the supreme court of Arizona, where said judgment and decree was in all things affirmed, but no written opinion was and has never been filed in said cause.

Done in open court this 4th day of May, A. D. 1896.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.
OWEN T. ROUSE,
Associate Justice.
J. D. BETHUNE,
Associate Justice.

223 It is agreed that the above and foregoing truly and fully states the facts in the above-entitled case, and that the same may be signed and filed as the findings of fact in said case.

C. W. WRIGHT,
HERNDON & NORRIS,
E. E. ELLINWOOD,
Attorneys for Appellants.
H. Z. ZUCK AND
E. T. CLARK,
Att'y- for Appellee, John Vories,
Attorneys for Appellees.

Endorsed: No. 450. In supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Filed 13 day of June, 1896. J. L. B. Alexander, clerk. Findings of facts. Charles Weston Wright, for appellants.

224 In the Supreme Court of the United States.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERCANTILE COMPANY, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,
vs.
B. N. FREEMAN, F. L. KIMBALL, and J. H. HOSKINS, Copartners as the Arizona Central Bank, and JOHN VORIES, Appellees.

Comes the said appellants in the above-entitled cause and say that there is manifest error in the record and proceedings in said cause, and do hereby note, specify, and assign the same as follows:

I.

That on the basis that the mortgages of the appellees are good and are prior liens on the property covered by them, yet said mortgages do not cover all of said property in controversy, but, on the contrary, only cover 6,000 head out of 6,200 head; that therefore as 200 bears to 6,000 said property is not incumbered by said mort-

gages. It follows that in said proportion the mortgage of
225 said Northwestern National Bank, appellant, is a prior lien,
and that the court erred in adjudging that the mortgages of
appellees were prior liens on all of said property.

II.

That said district court and said supreme court in affirming the same erred in admitting in evidence the mortgages from said Fulton to appellees, and marked Exhibits "A" and "B," against the objections of appellants, said mortgages being as against said appellant, Northwestern National Bank, null and void, the description of the property therein being so uncertain as to render the same void.

III.

That the lower court erred in holding, and this court erred in sustaining such holding, that said mortgages were valid and subsisting liens on all of said property, whereas said pretended mortgages were and are void, as the description of the property therein attempted to be conveyed as a security is insufficient, vague, and so uncertain as to be no identification thereof, and for the further reason that said mortgages do not attempt to convey all of the sheep of the defendant Fulton, but only a certain number out of a greater number, and there is nothing in the mortgages whereby those attempted to be mortgaged could be distinguished from those that were not attempted to be and were not mortgaged.

226 IV.

That the court erred in permitting, in the trial of said cause, the witness J. H. Hoskins, while testifying for the plaintiff-, and over the objections of the defendants, to state a conversation had between F. W. Sission, John Vories, the witness, and the defendant Fulton, on January 3, 1893, in regard to a mortgage given by Fulton to Arizona Lumber & Timber Company, and as to certain negotiations as to the wool on the sheep, and as to the release thereof from plaintiffs' and the Vories mortgage; certain objections made by witness to the form of mortgage, and that he could not carry Fulton any longer unless his and the Vories mortgages were distinctly recognized, and as to the point raised by the witness that the character of the sheep might change from year to year; as to the release then and there made as to wool; as to a certain insertion being made in said mortgage in the handwriting of Hoskins, said witness; that said mortgage was subject to certain other mortgages, and that the number of sheep described in the same were to be kept good out of the increase; because said evidence can have but one effect, and that is to change the description of the property in the mortgages themselves to include therein property not included in the mortgage
itself; that it thereby changes and varies the terms of the
227 mortgage, and that in fraud and deprivation of the rights of
appellants in the premises; that said conversation, and the

agreement claimed that was made thereby, is an independent contract, if it be a contract, from the mortgages, and cannot in any way bind said appellants or either of them.

V.

The court erred in overruling the motion of appellants to strike out of the evidence the two mortgages of appellees marked Exhibits "A" and "B," said mortgages being void, for the reasons already assigned, as to appellants, and especially as to appellant The Northwestern National Bank.

VI.

The court erred in denying and overruling defendants' motion for a new trial of said cause for each and all of the reasons hereinabove assigned, and for the further reason that the judgment and decree of the court is not supported or sustained by the evidence—that is to say:

1. The evidence shows that the mortgage of The Arizona Central Bank, appellee, covered only five thousand head of sheep; that the mortgage of appellee Vories covered only one thousand head of sheep, whereas at the time said mortgages were made and delivered said Fulton, the mortgagor, owned sixty-two hundred head of sheep, of which said mortgagees had notice at the time of the making and delivery of their mortgages; that after the delivery of said
228 mortgages said Fulton, the mortgagor, had sold and butchered over seventeen hundred head of said sheep, of which said appellees had notice and to which they both consented; that many more of said sheep had strayed away, become lost, and that many others had died, and that at the time of the institution of this action there did not remain of said sheep so mortgaged to exceed one thousand head.

2. That at the time the decree herein was rendered there were not more than one thousand head of sheep owned and possessed by said Fulton that were included in said mortgages of appellees, and yet the lower court held that all of the sheep on hand at the time of making said decree, up to six thousand head, including thereby all increase, all sheep not included in said two mortgages, should be sold to satisfy the two mortgages of said appellees, without regard to any rights that appellants may have had in the sheep not included in said two mortgages of appellees.

3. The evidence fails to show that there were 1,200 lambs, 1,600 ewes, and 2,200 wethers, or any other number of lambs, ewes, or wethers, that were marked as described in said mortgages of appellees, nor was there any evidence as to how many of any age, sex, or character there were of said sheep in the band of sheep of the said Fulton at the time the said mortgages of appellees were delivered, or of either of them. It is nowhere found in the evidence
229 the kind, sex, character, description, or other distinguishing marks of the sheep that were included or attempted to be included in said two mortgages of said appellees were at the time said mortgages were made in the herd or band of sheep of the said

mortgagor, or what of that number then were in the band at the time of the decree.

4. The increase of said sheep were not included in said two pretended mortgages of the appellees, and therefore could not be included in any decree foreclosing said mortgages.

5. The evidence clearly shows that more than four thousand head of the sheep in the band, and that were in the band at the time the decree of the lower court was rendered herein, were not in the band at the time of the execution and delivery of the two mortgages of the appellees, were not included in said mortgages, and were not and could not be included in said decree foreclosing said two mortgages.

6. The mortgage of appellee Arizona Central Bank attempted to convey 1,600 ewes, 2,200 wethers, and 1,200 lambs, and the mortgage of appellee Vories attempted to convey 1,000 weathers and dry ewes. The evidence shows that when the property was levied upon by the sheriff under the attachment caused to be issued by the Rioridan Mercantile Company against said Fulton that there were then in said band of sheep only 2,926 ewes, 900 wethers, 1,287 lambs, and 118 rams, and that there were not sufficient wethers to make
230 up the number described in said mortgages, and that there were a surplus of ewes, even if the pretended substitution had been made and was good.

VII.

The court erred in admitting in evidence, over the objection of appellants, evidence tending to prove a breach of the contract between appellees and appellant The Arizona Lumber & Timber Company for failure to keep the number of sheep designated in appellees' pretended mortgages good out of the increase of said sheep, to which alleged contract said appellant, Rioridan Mercantile Company, was not a party; that said alleged contract was no part of said alleged mortgages of said appellees sought to be foreclosed in this action, nor was it a part of the chain of title in and to said property, nor was there any consideration for said alleged agreement, nor could it in any event bind said appellant, The Northwestern National Bank.

VIII.

That court erred in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description, and for the reason that said description was of a certain number of sheep that were included in a larger number, all running
231 together, all bearing the same mark, with no way of identifying those included in said morgages from those not included, the ones mortgaged not being in any way segregated and the possession of all of them being left with the mortgagor.

IX.

The court erred in adjudging that the property included in the said attachment lien of the said Rioridan Mercantile Company, and

sold and delivered to said company thereunder, was the same property that is conveyed or attempted to be conveyed by the mortgages of said appellees, for the reasons heretofore assigned and for the reason that said attachment lien and the said sale thereunder made was of all the sheep of the said Fulton, and the evidence overwhelmingly shows that more than four thousand of the said sheep included in said attachment lien and sale were not included in the mortgages of said appellees or of either of them.

X.

The court erred in adjudging that the rights, titles, and interests obtained by said Riordan Mercantile Company by virtue of said attachment lien and sale was subject to the alleged rights of said appellees by virtue of their said pretended mortgages, and for the reason that said mortgages of said appellees were each void
232 for uncertainty of description of the property attempted to be conveyed thereby, and that the property so attached as aforesaid and so sold by virtue of said attachment as aforesaid is not the property included in and attempted to be conveyed by said mortgages of said appellees or of either of them.

XI.

The court erred in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton notwithstanding said mortgages, and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central bank and said Vories in the proportion of five dollars to the former to one to the latter, and for the reasons heretofore herein urged, and for the further reason that the indebtedness of said Fulton to said appellees was not joint, and the mortgages given to secure the same were not joint, and that therefore the court, in adjudging the division of the sale of said property as aforesaid, created a new contract for said parties, there being no community of interest between said appellees, and to the damage of appellants; that the two mortgages of appellees attempt to convey different property, and by the decree of said court no distinction is made in said property nor in the priority of the lien of said mortgages, but said mortgages are foreclosed, the property—that which is at-
233 tempted to be included in said mortgages as well that which is not—is ordered sold, and the proceeds arising from such sale is adjudged to be first divided between said appellees in said proportions.

XII.

The court erred in deciding that said appellee's, The Arizona Central Bank, mortgage conveyed 5,000 head of sheep marked thus: ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear; and that 1,000 more of said sheep were conveyed by mortgage to said appellee Vories and with the same marks, and for the reason that the evidence nowhere shows how many of

said sheep so marked were in existence at the time of the making of said mortgages, nor the sex, age, or character of the same, nor the number of the sheep in the band at the time of the decree were in the band at the time of the execution of the said mortgages of appellees.

XIII.

The court erred in adjudging that appellants Riordan Mercantile Company and Arizona Lumber & Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees, for the reason that from the description thereof
234 in said mortgages it was impossible to distinguish or to identify the property attempted to be conveyed thereby, and there is no evidence in the case that any one knew what property was attempted to be conveyed thereby save from the mortgages themselves.

XIV.

The court erred in adjudging that F. W. Sisson, as the treasurer of said Riordan Mercantile Company, agreed with said appellee bank and said Vories that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep; that the wool was released by said agreement to said company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of appellees, and for the reason that the evidence shows that said Fulton was not indebted to said Riordan Mercantile Company at that time; that said company was not a party or privy to said pretended agreement, and that written releases of said wool had already and before been made to said Arizona Lumber & Timber Company, and the evidence fails to show that said Riordan Mercantile Company received any consideration of any kind at any time from said appellees for any such agreement or from any one else.

XV.

235 The court erred in adjudging that on the date of its decree herein the mortgage of said appellee bank covered 5,000 head of sheep of the Fulton herd and mark, for the reason that the evidence shows that there were in said band of sheep carrying said mark not to exceed 1,000 head of sheep that were in existence on the day said mortgage was executed, and said adjudication attempts to substitute 5,000 head of sheep after the making of said two mortgages to appellees, and that regardless whether they were ewes, wethers, or lambs, and regardless whether they were the same sheep conveyed by and attempted to be described in said pretended mortgages or not.

XVI.

The court erred in making said substitution and then holding it good as to the said Riordan Mercantile Company, for the reason that it was not a party or a privy thereto; also for the reason that the property so attempted to be substituted was not in any way in-

cluded in either of the mortgages of said appellees; that the property attempted to be substituted was never segregated, distinguished, nor identified and no way was suggested or agreed upon whereby said property was or could be segregated from the whole or in any way identified; that said description was only of a certain increase in numbers, without giving the number, the age, sex, or character thereof, but was only a smaller number out of a larger number of the same kind and band; that no possession was
236 taken of said increased number or of the number of the increase that is adjudged was agreed should be added to said mortgages, nor was there any agreement of substitution between said Fulton, the mortgagor and owner, and said appellees, nor was any consideration in any way paid to or received by said Fulton for such pretended agreement of substitution.

XVII.

The court erred in adjudging, and for the reasons hereinbefore assigned, that The Northwestern National Bank, one of said appellants, was bound by said pretended agreement of substitution or was bound by said pretended mortgages of said appellees, or that said mortgages were a prior lien on said property or on any of it to its own.

Wherefore and by reason of the premises aforesaid these appellants pray that said judgment and decree be reversed, be vacated, and be for nought held.

HERNDON & NORRIS,
E. E. ELLINWOOD,
C. W. WRIGHT,
Attorneys for Appellants.

237 Endorsed: No. 450. In supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Filed 22 day of June, 1896. J. L. B. Alexander, clerk. Assignment of errors. Charles Weston Wright, for appellants.

238 In the Supreme Court of the Territory of Arizona.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORDAN MERCANTILE COMPANY, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, and J. H. HOSKINS, Copartners as the Arizona Central Bank, and JOHN VORIES, Appellees.

Know all men by these presents that we, Northwestern National Bank, Riordan Mercantile Company, and Arizona Lumber & Timber Company, all being corporations, and the former being a corporation under the national banking law and having its residence in the city of Chicago and State of Illinois, and the two latter being

duly organized and existing under and by virtue of the laws of the Territory of Arizona and having their principal offices in the county of Coconino, in said Territory, as principals, and D. M. Riordan and T. A. Riordan, of Flagstaff, Coconino, Arizona, as sureties, are held and firmly bound unto the said Arizona Central bank and John Vories in the penal sum of fifteen thousand dollars, lawful money of the United States, to be paid to them, the said obligees herein; for the payment of which, well and truly to
239 be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of June, A. D. 1896.

Whereas the above-named principals have prosecuted an appeal to the Supreme Court of the United States—the same having been duly and properly allowed—from a final judgment rendered against them and in favor of the said obligees herein in the supreme court of the Territory of Arizona to reverse the judgment rendered in said court:

Now, therefore, the condition of this obligation is such that if the above-named principals and obligors herein shall prosecute their said appeal with effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

NORTHWESTERN NATIONAL BANK, [SEAL.]
By HERNDON & NORRIS, *Its Attorneys.*
RIORDAN MERCANTILE CO., [SEAL.]
By F. W. SISSON, *Treas.*
ARIZONA LUMBER & TIMBER CO., [SEAL.]
By F. W. SISSON, *Treas.*
D. M. RIORDAN. [SEAL.]
T. A. RIORDAN. [SEAL.]

240 TERRITORY OF ARIZONA, } ss:
County of Coconino, }

D. M. Riordan and T. A. Riordan, each being of the county of Coconino, in said Territory, being by me first duly sworn, on their several oaths do say, and each for himself, that they are the sureties in the above and foregoing bond, and that after paying his just debts and liabilities he is worth fifteen thousand dollars in real and personal property within the jurisdiction of said court and subject to execution and levy and that is not exempt from execution

D. M. RIORDAN.
T. A. RIORDAN.

Subscribed and sworn to before me this 6th day of June, 1896.

C. A. KELLER,
[DISTRICT COURT SEAL.] *Clerk District Court, Coconino County, A. T.*

241 Endorsed: No. 450. In supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, *vs.* Arizona Central Bank *et al.*, appellees. Filed 22 day of June, 1896. J. L. B. Alexander, clerk. Appeal & supersedeas bond. I hereby approve the within bond this 22nd day of June, 1896. A. C. Baker, chief justice. Charles Weston Wright, for appellants.

242 In the Supreme Court of the United States.

NORTHWESTERN NATIONAL BANK, a Corporation; RIORIDAN Mercantile Company, a Corporation; Arizona Lumber & Timber Company, a Corporation, Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, and J. H. HOSKINS, Copartners as the Arizona Central Bank, and JOHN VORIES, Appellees.

The United States of America to B. N. Freeman, F. L. Kimball, and J. H. Hoskins, copartners as the Arizona Central bank, and John Vories, Greeting:

You and each of you are hereby cited and admonished to be and appear at the session of the Supreme Court of the United States to be holden in the city of Washington, District of Columbia, on the second Monday in October, A. D. 1896, pursuant to an appeal allowed by the honorable chief justice of the supreme court of the Territory of Arizona on the 27th day of May, A. D. 1896, from a judgment rendered in the supreme court of the Territory of Arizona on the 4th day of May, A. D. 1896, in an action on appeal to that court, wherein you and each of you were appellees and The Northwestern National Bank, a corporation, and The Rioridan Mercantile Company, a corporation, and The Arizona Lumber & Timber Company, a corporation, were appellants, to show cause, if any there be, why said judgment in your favor should not be set aside, reversed, corrected, and why speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice
243 of the Supreme Court of the United States, this 22d day of June, A. D. 1896.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

The undersigned, being the attorney of record of the said John Vories, appellee, and to whom the above citation is directed, does hereby accept personal service on said John Vories, appellee, this twenty-second day of June, A. D. 1896.

HARRY Z. ZUCK,
Attorney for said John Vories, Appellee.

PRESCOTT, ARIZ. TER., *June* 23, '96.

Received a copy of the foregoing citation this day at Prescott, Arizona.

C. E. & F. HERRINGTON,
Att'ys for Arizona Central B'k.

On this 23rd day of June, in the year of our Lord one thousand eight hundred & ninety-six, personally appeared J. L. Munds before me, the subscriber, A. J. Herndon, clerk of the court, 4th judicial district, Yavapai Co., Arizona, and makes oath that he delivered a true copy of the within citation to F. Herrington, of the firm of C. E. & F. Herrington.

J. L. MUNDS.

Sworn to and subscribed the 23rd of June, A. D. 1896.

[Seal District Court, Fourth Judicial District, Yavapai Co., Arizona.]

A. J. HERNDON, *Clerk.*

244 The undersigned, being the attorney of record of the said John Vories, appellee, and to whom the above citation is directed, does hereby accept personal and due and legal service on said John Vories, appellee, this sixth day of July, 1896.

E. S. CLARK,
Attorney of Record for said John Vories, Appellee.

TERRITORY OF ARIZONA, } ss:
County of Coconino, }

On this sixth day of July, 1896, personally appeared before me, C. A. Bush, a notary public in and for Coconino county, Arizona Territory, Ralph H. Cameron and made oath that he delivered a true copy of the within citation to E. S. Clark, attorney of record of said appellee, John Vories.

RALPH H. CAMERON.

Sworn to and subscribed before me this sixth day of July, 1896, at Flagstaff, Arizona.

[Seal of C. A. Bush, Notary Public, Coconino County, Arizona.]

C. A. BUSH,
Notary Public in and for Coconino County, Arizona.

245 [Endorsed:] No. 450. In supreme court, Territory of Arizona. Northwestern National Bank *et als.*, appellants, vs. Arizona Central Bank *et al.*, appellees. Filed 8th day of July, 1896. J. L. B. Alexander, clerk, by J. F. Meador, dep'y. Citation on appeal. Charles Weston Wright, for appellants.

246 UNITED STATES OF AMERICA, } ss:
Territory of Arizona, }

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify that the above and foregoing is a full,

true, and correct transcript of the record and all proceedings had in the cause entitled Northwestern National Bank, a corporation; Riordan Mercantile Company, a corporation; Arizona Lumber & Timber Company, a corporation, against B. N. Freeman, F. L. Kimball, and J. H. Hoskins, copartners as the Arizona Central bank, and John Vories, as the same appears of record and on file in my office; also that the citation herewith and hereunto attached is the original citation issued in said cause in the supreme court of the Territory of Arizona, and that no opinion has been filed in said cause by said supreme court at this date.

Seal Supreme Court of Arizona.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 8 day of July, A. D. 1896, at Phœnix, the capital of the Territory of Arizona.

J. L. B. ALEXANDER, *Clerk*.

Endorsed on cover: Case No. 16,348. Arizona Territory supreme court. Term No., 569. The Northwestern National Bank, The Riordan Mercantile Company, & The Arizona Lumber & Timber Company, appellants, *vs.* B. N. Freeman, F. L. Kimball, and J. H. Hoskins, copartners as the Arizona Central bank, and John Vories. Filed July 29, 1896.

No. 209. 18.

Brief of Ellinwood, Britton & Bro

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Dec 13, 1897.

DEC 13 1897
JAMES H. McKENNEY
CLERK

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER & TIMBER COMPANY,
APPELLANTS,

v.

B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, CO-PARTNERS, AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES,
APPELLEES.

No. 209.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF ON BEHALF OF APPELLANTS.

E. E. ELLINWOOD,
Attorney for Appellants.

A. T. BRITTON,
A. B. BROWNE,
Of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER AND TIMBER COMPANY,
APPELLANTS,
v.
B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, CO-PARTNERS AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES,
APPELLEES.

No. 209.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Brief on Behalf of Appellants.

STATEMENT.

The following is the statement of facts in the above-entitled cause, as found by the Territorial Supreme Court (Rec., pp. 103, 107):

"On July 10, 1890, Harry Fulton, one of the defendants "in the Court below, executed an alleged chattel mortgage "for $7,500, payable in one year, in favor of Arizona Cen- "tral Bank, one of the appellees herein and plaintiffs in the "Court below; that the description in said mortgage of the "property purporting to be covered by it is as follows: "'1,200 lambs, marked—ewes with hole in left ear and split "'in right; wethers, hole in right ear and split in left ear; "'1,600 ewes marked hole in left ear and split in right ear; "'2,200 wethers marked hole in right ear and split in left "'ear, making 5,000 sheep in all with the Fulton brand.'

"That on said day said Fulton executed another alleged "mortgage for $4,000, payable in ninety days, in favor of "John Vories, one of the appellees herein and one of the "defendants in the Court below; that the description in "said alleged mortgage is as follows: 'Wethers and dry "'ewes to the number of 1,000, the wethers marked with a "'split in the left ear and a hole in the right; ewes marked "'with a hole in the left ear and a split in the right.'

(It will be noted that *neither* of these mortgages covered the *increase* of the animals nor the annual wool clip.)

"That on said day said Fulton owned and possessed 6,200 "sheep that were herded and run together, and this was all "he owned, said sheep being marked as follows: 'Ewes and "'ewe lambs split in the right ear, hole in the left; wethers "'and wether lambs reverse;' and both of the said appel- "lees had knowledge of this fact at the time they accepted "their alleged mortgages, the one on 5,000 head and the "other on 1,000 head, 200 head not being included in either "of said mortgages, all of said sheep having the same mark "and running in the same herd, and none of them being "capable of identification save only by the ear mark put on "them as aforesaid, and that therefore there was no way "by which any of said sheep could be distinguished from "any of the others.

"That said Fulton continued in the ownership and pos- "session of all of said sheep, save only such as died, were "sold by him, consumed or lost, until the 18th December,

"1893. At no time did appellees, or either of them, ever "take or ever have possession of said sheep, or any of them, "or of the increase thereof, nor were any of said sheep or "the increase thereof ever by any one identified, designated, "in any way seggregated, apportioned, or substituted to the "or on account of the said pretended mortgages, or of either "thereof. From date of said mortgages (July 10, 1890) to "January 4, 1893, said Fulton from time to time sold of "said sheep as follows: 1,700 head, at $3 per head, that "were by said Fulton accounted for, and the proceeds of "which he deposited with the appellee Arizona Central "Bank; that both of said appellees knew of these sales and "consented to them.

"On January 4, 1893, said Fulton executed a mortage for "$8,885 in favor of Arizona Lumber & Timber Com- "pany, one of appellants herein and one of the defendants "in the Court below, covering, among other property, the "following-described sheep: 'About 3,000 ewes, 1,000 "'wethers, and 2,000 lambs, same being all the sheep now "'owned by mortgagor, and including all wool and increase "'which may be produced by said sheep marked—ewes, split "'in right ear, hole in left; wethers reverse.' At the in- "stance of appellees said appellant, Arizona Lumber & "Timber Co., permitted the following recital to be in- "serted in said last-mentioned mortgage, namely: 'This "'being subject to a mortgage on 5,000 of above sheep to "'Arizona Central Bank, and one on 1,000 head, and the resi- "'dence property to John Vories, said number, as described "'in mortgages, to be kept good out of increase.' There "was consideration for the foregoing recital in the mort- "gage of January 4, 1893, namely, that the appellees "should forbear to foreclose their mortgages, and should "release their claim on the wool clip of 1893, the wool at "that time not having been shorn.

"That to August 30, 1893, $3,000 of the amount claimed "to be due on the mortgage of January 4, 1893, was paid "out of wool proceeds, and that on said day said Fulton, "for the purpose of securing a $500 advance, and applying "the remainder as a payment on said mortgage of January "4, 1893, executed his promissory negotiable note, payable

" in 90 days, securing the same by a chattel mortgage for " the sum of $6,000 to the Arizona Lumber & Timber Co.

" That said mortgage was a conveyance, as a security for " the payment of said note, of sheep, the same being in said " mortgage described as follows, namely: 'About 3,200 " ' ewes, more or less; about 1,300 wethers, more or less; " ' about 1,400 lambs, more or less, being all the sheep now " ' owned by mortgagor, including all the wool and increase " ' which may be produced by said sheep—marked, ewes and " ' ewe lambs, split in right ear, hole in left; wethers and " ' wether lambs, reverse.'

" That in said last-mentioned mortgage no recital or ref- " erence was made in any way, nor in any manner, to the " existence of any other mortgage or mortgages whatso- " ever.

" That on the 29th day of September, 1893, and prior to " the maturity of said last-mentioned note of $6,000, said " appellant Arizona Lumber & Timber Co., representing " that said mortgage was a first and prior lien on said de- " scribed sheep, and by means thereof, sold, assigned, in- " dorsed, and delivered said note and mortgage to the " Northwestern National Bank, one of the appellants herein " and one of the defendants in the Court below, said North- " western National Bank becoming an innocent purchaser " for value.

" That on December 18, 1893, said Fulton being then " indebted to Riordan Mercantile Company, one of the ap- " pellants herein and a defendant in the Court below, in " the sum of $810.91, it brought its action in said District " Court against said Fulton whereby to collect the same, " and at the same time caused to be issued out of the clerk's " office of said Court a writ of attachment, which was then " levied on the property following, namely: 'all the right, " ' title, and interest of the defendant Harry Fulton in and " ' to the following-described sheep: 2,926 ewes, marked " ' hole in left ear, split in right; 900 wether sheep, marked " ' hole in right ear, split in left ear; 1,287 lambs—ewe " ' lambs marked hole in left ear, split in right; wether " ' lambs marked hole in right ear, split in left; 118 rams,' " same being all of the sheep then owned by the said " Fulton.

"That on 16th March, 1894, judgment was rendered in "said suit in favor of said plaintiff company and against "said Fulton, for said amount, and said attachment lien "was foreclosed; that on the 31st day of March, 1894, the "Sheriff of said county of Coconino, by virtue of and "pursuant to said judgment, sold said property and de- "livered the same to the appellant Riordan Mercantile "Company, who then entered into the possession thereof, "was so in the possession thereof when this cause was "tried in the lower Court, and are still in the possession "thereof

"That by virtue of said writ of attachment the Sheriff "attached all the sheep then owned by said Fulton, and "that on said day, to wit, on the 18th day of December, "1893, there were of said sheep only 1,000 head of ewes "remaining out of all the sheep that existed on July 10, "1890, the date of said alleged mortgages to appellees; "that the remainder of said ewes, all the male sheep and "the lambs, had by that time died, been consumed, sold or "lost.

"That subsequent to the making of said alleged mort- "gages to said appellees, an oral agreement between them "and the said Fulton was made that the securities of ap- "pellees were to be kept good out of the increase by sub- "stitution, the consideration therefor being that said Fulton "might sell and dispose of the said sheep without interfer- "ence from appellees.

"That Sisson, a witness for appellants in this case, is and "was during all of said transactions the treasurer of both the "Riordan Mercantile Co. and the Arizona Lumber & Tim- "ber Co., appellants herein, and that these two corporations "have practically the same officers.

"That in said District Court said Arizona Central Bank "brought its suit as plaintiff against said Fulton, Vories, "Donahue as Sheriff, the Arizona Lumber & Timber "Company, the Riordan Mercantile Company and the "Northwestern National Bank, as defendants, asking for a "foreclosure of its said alleged mortgage, the same being "the above-entitled cause.

"That said action was tried and judgment was rendered

" foreclosing said alleged mortgages of both of appellees " herein and also the said mortgage dated January 4, 1893, " of said Arizona Lumber & Timber Company and the " mortgage owned by said Northwestern National Bank as " aforesaid, in which said judgment said Court adjudged " that appellees have a prior and first lien on said property, " viz., the Arizona Central Bank upon 5,000 sheep of the Ful- " ton mark by reason of its said mortgage, and the said Vories " on 1,000 sheep of the Fulton mark by reason of his said " mortgage; and said Court decreed and ordered that an " order of sale issue for the sale of all of said property to " the Sheriff of said county, and that the proceeds arising " therefrom be divided by the Sheriff and applied as fol- " lows, namely, at the ratio of five dollars to said Arizona " Central Bank and one dollar to said Vories; that in case " anything should be left after the payment of said two " mortgages to said bank and Vories, the same should be " applied to the payment of the judgments of said North- " western National Bank and said Arizona Lumber & Tim- " ber Company and Riordan Mercantile Company in the " order named."

SPECIFICATION OF ERRORS.

The appellants have made seventeen assignments of error (Rec. 107–113), which are grouped in the discussion of this case under seven heads as follows:

First. In the first assignment of error it is set forth that the trial Court erred in adjudging, and the Territorial Supreme Court erred in affirming said judgment, that the mortgages of the appellees were prior liens on *all* of the sheep owned by defendant Fulton at the time of the execution of said mortgages, even though said mortgages had been good and prior liens on the sheep specified therein.

Second. In the second, third, fifth, and eighth assignment of error, it is set forth that the trial Court, and the Territorial Supreme Court in sustaining its holding, erred

in admitting in evidence the mortgages from defendant Fulton to the appellees, marked Exhibit "A" and "B," against the objections of the appellants; and in overruling motion of appellants to strike out of the evidence the said mortgages; and in holding that said mortgages were valid and subsisting liens on all of said property; and in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description.

THIRD. In the fourth and seventh assignments it is set forth that the Court erred in admitting, over the objection of the appellants, testimony concerning a conversation between J. H. Hoskins, John Vories, F. W. Sisson, and Harry Fulton, and evidence relative to an alleged agreement, and evidence tending to prove a breach of contract between the appellees and appellant Arizona Lumber and Timber Company.

FOURTH. The trial Court erred, as set forth in the fifteenth and sixteenth assignments, in adjudging that on the date of its decree herein the mortgage of said appellee bank covered five thousand head of sheep of the Fulton herd and mark, such adjudication attempting to substitute five thousand head of sheep after the making of said two mortgages to appellees; the trial Court erred in attempting said substitution and then holding it good as to appellants Riordan Mercantile Company and Northwestern National Bank.

FIFTH. The trial Court erred, as set forth in the eleventh assignment, in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton, notwithstanding said mortgages, and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central Bank and said Vories, in the proportion of five dollars to the former to one to the latter.

SIXTH. The trial Court erred, as set forth in the seven-

teenth assignment, in adjudging that appellant Northwestern National Bank was bound by said pretended agreement of substitution or was bound by said pretended mortgages of appellees, or that said mortgages were prior liens on said property, or on any of it to the mortgage owned by said appellant.

SEVENTH. In the sixth, ninth, tenth, twelfth, thirteenth, and fourteenth assignments it is set forth that the Court erred in denying and overruling defendant's motion for a new trial of said cause; and in deciding that the mortgage to said appellee the Arizona Central Bank conveyed five thousand head of sheep, marked—ewes with hole in left ear and split in right, wethers with hole in right ear and split in left ear, and that a thousand more of said sheep were conveyed by mortgage to said appellee Vories, with the same marks; and in adjudging that the property included in the said attachment lien of the said Riordan Mercantile Company, and sold and delivered to said Company thereunder, was the same property that is conveyed, or attempted to be conveyed, by the mortgages of said appellees; and in adjudging that the rights, title, and interests, obtained by said Riordan Mercantile Company, by virtue of said attachment lien and sale, was subject to the alleged rights of said appellees, by virtue of their said pretended mortgages; and in adjudging that appellants Riordan Mercantile Company and Arizona Lumber and Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees; and in adjudging that F. W. Sisson, as the Treasurer of said Riordan Mercantile Company, agreed with said appellees that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep, and that the wool was released by said agreement to said Company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of said appellees.

ARGUMENT.

Point I.

The decree of the trial Court is that the mortgage owned by Northwestern National Bank is a valid lien against the sheep in controversy. (Rec., p. 106.) The question involved is one of priority.

The evidence shows that defendant Fulton was the owner of sixty-two hundred head of sheep at the time mortgages to appellees were executed, and that said mortgages only attempted to cover six thousand head, leaving two hundred head unencumbered. (Rec., p. 104.)

Also that the mortgage owned by appellant Northwestern National Bank specifically covered *all* the sheep in the Fulton band, including all increase from same. (Rec., p. 105.)

From these facts there is no way of avoiding the conclusion that the mortgage owned by appellant Northwestern National Bank is a prior and subsisting lien on at least a part of the sheep in controversy.

Point II.

The trial Court erred for the reason that said pretended mortgages on their faces, as against appellant Northwestern National Bank, are null and void. Also for the reason that said pretended mortgages were and are void, as the description of the property therein attempted to be conveyed, as a security, is insufficient, vague, and so uncertain as to be no identification thereof, and for the further reason that said mortgages do not attempt to convey *all* of the sheep of defendant Fulton, but only a certain number out of a greater

number, and there is nothing in the mortgages whereby those attempted to be mortgaged could be distinguished from those that were not attempted to be and were not mortgaged.

The mortgage owned by appellant Northwestern National Bank and the attachment levy of appellant Riordan Mercantile Company specifically covered all the sheep in the Fulton band, and all increase of same. (Rec., p. 105.)

The description of property attempted to be covered by the alleged mortgage made by defendant Fulton July 10, 1890, in favor of appellee Arizona Central Bank is as follows:

"Twelve hundred lambs marked—ewes with hole in left "ear and split in right; wethers, hole in right ear and split "in left ear; sixteen hundred ewes marked with hole in "left ear and split in right ear; twenty-two hundred wethers "marked with hole in right ear and split in left ear; mak-"ing five thousand sheep in all with the Fulton brand." (Rec., p. 104.)

The description of the property attempted to be covered by the alleged mortgage made by defendant Fulton, July 10, 1890, in favor of appellee John Vorhies is as follows:

"Wethers and dry ewes, to the number of 1,000; weth-"ers marked with a split in the left ear and a hole in the "right; ewes marked with a hole in the left ear and a "split in the right." (Rec., p. 104.)

At the time the said mortgages to appellees were executed, defendant Fulton was the owner and possessor of sixty-two hundred sheep of various ages and sex, all in the same mark and herd (that is, all ewes were marked alike, and all wethers were marked alike), and both appellees had knowledge of these facts at that time, and yet accepted their alleged mortgages, the one on 5,000 head and the

other on 1,000 head, 200 not being included by either, and no way being suggested for distinguishing any particular sheep. (Rec., p. 104.)

Defendant Fulton continued his possession and control over all said sheep, excepting those that died or were sold, consumed, or lost, until December 18, 1893, the date of the attachment by appellants Riordan Mercantile Company. (Rec., p. 104.)

At no time did the appellees, or either of them, ever take or have possession of all or any of said sheep; nor were said sheep, or any of them, at the time of the execution of the alleged mortgages, or at any other time, by the appellees, or by defendant Fulton, or by any one else, identified, set aside, distributed, separated, designated, or apportioned, or substituted to the pretended mortgages of the appellees, or to either thereof; or were said sheep which were attempted to be mortgaged ever in any way separated from those which were not attempted to be and were not mortgaged. (Rec., p. 104.)

"A chattel mortgage must contain terms of description "that will serve to distinguish the property embraced "therein from all other property of the same kind, because "the claim of the mortgage is to be enforced on the identi- "cal property mentioned in the mortgage; and if the de- "scription in that instrument be so vague and uncertain as "necessarily to apply equally to all property of that kind, "then there can be no identification of it."

Pingrey on Chattel Mortgages, Sec. 142.

"When the precise number only is conveyed and there is "in fact a greater number, and no intention is manifest to "include the whole, there would be a failure of identifica- "tion of particular things conveyed, and the mortgage "must be void for want of proper description."

Pingrey on Chattel Mortgages, Secs. 149 & 150.
Cobbey on Chattel Mortgages, Secs. 181 & 182.
Jones on Chattel Mortgages, Sec. 56.
Herman on Chattel Mortgages, Sec. 42.

"Where there is a larger number of the same kind in "the possession of the mortgagor and no particular descrip- "tion otherwise than that applicable to all of that class, "nor any selection nor delivery nor any specification as to "which are intended out of a larger lot on hand, such "mortgage will be ineffectual to pass any title to any par- "ticular property or any interest in the property on hand."

Stonebreaker v. *Ford*, 81 Mo. 538.
Fowler v. *Hunt*, 48 Wis. 345.
Richardson v. *Alpena Lumber Co.*, 40 Mich. 203.
Blakely v. *Patrick*, 67 N. C. 40, 12 Amer. Rep. 600.
Kelly v. *Reed*, 57 Miss. 89.
Avery v. *Popper*, 34 S. W. 325.
Parsons Savings Bank v. *Sargent*, 20 Kan. 576.
Clark v. *Vorhees*, 36 Kan. 144, 12 Pac. 529.
Price v. *McComas*, 21 Neb. 195; 31 N. W. 511.
Rood v. *Welch*, 28 Conn. 157.

"The property described must be identified at the time "of the execution of the mortgage."

Cobbey on Chattel Mortgages, Sec. 159 and cases there cited.

"The mortgage and transfer of property are not com- "pleted so as to pass the property so long as anything re- "mains to be done to identify it."

Pingrey on Chattel Mortgages, Sec. 142.
Jones on Chattel Mortgages, Sec. 55.
Herman on Chattel Mortgages, Sec. 38.
Fowler v. *Hunt*, 4 N. W. 481.
Newall v. *Warner*, 44 Barb. 258.
Lee v. *Cole*, 21 Pac. 819.
Payne v. *Wilson*, 74 N. Y. 348.

In this action in the trial Court the Arizona Central Bank was plaintiff and John Vories one of the defendants, and there was no community of interest between them. Said appellee bank therefore attempted to take a mortgage on 5,000 head of sheep out of 6,200 running together, of the

same kind and marks, without identifying them; and appellee Vories attempted a similar step on 1,000 head out of 6,200; 200 being excluded from both mortgages; there being no pretense of an attempt to mortgage *all* the sheep. (Rec., p. 104.) Under the foregoing decisions, we submit to the Court that said mortgages were and are void and that the lower Court should have so held.

Point III.

The appellees claim they are entitled to foreclosure of their alleged mortgages on the number of sheep described in said mortgages, by virtue of an alleged agreement with the appellant the Arizona Lumber and Timber Company, same being a recital inserted in the mortgage given to said appellant, January 4, 1893, by defendant Fulton; which recital is as follows:

"This being subject to a mortgage on 5,000 of above "sheep to Arizona Central Bank, and one on 1,000 head "and the residence property to John Vories; said number "as described in mortgages to be kept good out of the in-"crease." (Rec., p. 105.)

The Court sustained the above claim of appellees and admitted in evidence testimony concerning a conversation between Hoskins, Sisson, Vories, and Fulton; and evidence relative to this alleged agreement between appellees and appellant the Arizona Lumber and Timber Company; and evidence tending to prove a breach of contract between said parties.

The Court erred in this because said evidence can have but one effect, and that is to change the description of the property in the mortgages themselves, to include therein property not included in the mortgage itself; and to supply a deficit in one kind of property with other property not originally mortgaged; that it thereby changes and varies

the terms of the mortgages, and that in fraud and deprivation of the rights of appellants in the premises; that said conversation is "hearsay" as to appellant Northwestern National Bank, and the agreement claimed to have been made thereby is an independent contract, if it be a contract, from the mortgages, the breach of which could not be tried in this action; and cannot in any way affect said appellants Riordan Mercantile Company and Northwestern National Bank, or either of them; said appellant Northwestern National Bank having no notice or knowledge thereof. Also for the reason that said alleged contract was no part of said alleged mortgages of said appellees sought to be foreclosed in this action; nor was it a part of the chain of title in and to said property; nor were the appellants Riordan Mercantile Company and the Northwestern National Bank, or either of them, in any way parties to said alleged contract; nor was there any consideration to either of them in said alleged agreement, nor was defendant Fulton a party thereto; nor did he receive any consideration therein; nor could it in any event bind said appellants Riordan Mercantile Company and Northwestern National Bank.

Description in a mortgage is conclusive as to scope; one kind of property will not be taken to supply a deficit in another, and parol agreement will not enlarge scope of mortgage.

"There can be no agreement by the parties that will bind "others that there shall be a substitution of other property "for that first specified."

Cobbey on Chattel Mortgages, Secs. 158 and 173.
Pingrey on Chattel Mortgages, Sec. 148.
Jones on Chattel Mortgages, Sec. 62.
Hutton v. *Arnett*, 51 Ill. 198.
Elliot v. *Long*, 77 Tex. 467.
Citizens' Bank v. *Rhutasel*, 25 N. W. 261.

"The lien of a chattel mortgage is not affected by a prior "parol agreement between the mortgagor and third persons "that other mortgages to be executed by the mortgagor "shall have priority over it, where it is actually executed "and delivered in violation of such an agreement and with "the intent to give it priority; and it is immaterial whether "or not the mortgagee had notice of the prior parol agree-"ment."

Lazarus v. *The Henrietta National Bank*, 10 S. W. 252.

The rule would be, and is, just as stringent in subsequent as in prior contracts. A very strong case in point is that of "*In re Allen's estate*," 26 Atl. 591. In that case it appears that A gave claimant a mortgage on certain furniture and lumber. The mortgage provided that the lumber might be sold in course of business, but the stock should be kept up by purchase. A afterwards gave another mortgage on his entire stock of lumber to C, subject to claimant's mortgage. And it was assumed by claimant and C that claimant must be paid before C could realize. A became insolvent and C took possession of the property under his mortgage for division of the property among the creditors according to their respective rights, C at the time notifying claimant that he recognized his right. The Court held that claimant could only recover the value of the property then on hand which was in existence at the time of the execution of his mortgage. It was found that only a small pile of lumber, worth thirty-four dollars and forty cents, was then in existence which had been included in the original mortgage, and claimant recovered only that amount.

The evidence shows that the recital above set forth was the agreement of the appellant Arizona Lumber and Timber Company, and was a simple estoppel against *said appellant under* the *particular instrument* in which it occurred, the mortgage of January 4, 1893, and had no existence aside from that instrument; a breach of which

could be made *only by said appellant*, under that *particular instrument*, by attempting a foreclosure of same without reference to appellees.

August 30, 1893, said defendant Fulton being unable to further continue the running of his sheep without assistance, made a new mortgage to the appellant the Arizona Lumber and Timber Company, covering the following sheep:

"About 3,200 ewes, more or less; about 1,300 wethers, " more or less; about 1,400 lambs, more or less; being all " the sheep now owned by mortgagor, including all the " wool and increase which may be produced by said sheep, " marked—ewes and ewe lambs, split in right ear, hole in " left; wethers and wether lambs reverse." (R., p. 105.)

In this mortgage there was no recital or reference in any manner whatsoever to any other mortgage. A large part of the amount of same was credited on the mortgage of January 4, 1893, and a part was for further advances to defendant Fulton; but the mortgage of January 4, 1893, was left on the records as security for the remainder due on same by virtue of other property included in it (Rec., pp. 104-105); and while no release of the sheep included therein was made of record, the evidence shows that as a matter of fact the claim of the appellant Arizona Lumber and Timber Company was relinquished as to the sheep after the execution of the mortgage of August 30, 1893. (R., p. 105.) At the time appellant Arizona Lumber and Timber Company ceased to claim under the mortgage of January 4, 1893, against the sheep, the recital in said mortgage of January 4, 1893, which was never more than an executory contract, became of no effect against any one. So that when the said mortgage of August 30 was sold to appellant Northwestern National Bank, and when the attachment levy of the appellant Riordan Mercantile Com-

pany was made, the pretended agreement was no longer in effect, and the rights of said appellants could in no way be affected by it. Moreover, if there was a breach in said alleged agreement, it was a breach on the part of appellant Arizona Lumber and Timber Company, for which it would be responsible in a separate action, and has no part in this case.

We contend, however, that there has never been a breach in said agreement, and that no breach could occur except in the event of Arizona Lumber and Timber Company attempting to foreclose the mortgage of January 4, '93, irrespective of said recital. This is a question of simple contract and not a question of notice.

Point IV.

Appellees also lay claim to the number of sheep as described in their said mortgages by virtue of the oral agreement which they claim was made with defendant Fulton subsequent to the execution of said mortgages, and which was as follows:

"That the securities of appellees were to be kept good "out of the increase by substitution, the consideration "therefor being that said Fulton might sell and dispose of "the said sheep without interference from appellees." (Rec., pp. 106.)

We are at loss to know how such an agreement can be of any assistance to appellees or lend any virtue or validity to their mortgages; on the contrary, we had supposed that it had been the law from Twyne case down to the present time; that such an understanding between the parties to a mortgage would of itself render the mortgage absolutely void.

Peiser v. *Petticolas*, 50 Tex. 638.

Moreover, the evidence shows that neither of the appellants were parties thereto, and fails to show that either of them had any notice or knowledge thereof, and could not, therefore, be bound thereby. Said mortgages of appellees, even if valid, did not specify increase, and the increase of the sheep attempted to be mortgaged, if there were increase, were therefore not covered thereby.

Cobbey on Chattel Mortgages, Secs. 367 and 368.
Jones on Chattel Mortgages, Secs. 55 and 150.
Pingrey on Chattel Mortgages, Secs. 123 and 216.
Winter v. *Lanshere*, 42 Ia. 471.
Thorp v. *Cowles*, 7 N. W. 677.
Boggs v. *Stankey*, 14 N. W. 392.
Enright v. *Dodge*, 24 At. 768; 64 Vt. 502.
Darling v. *Wilson*, 60 N. H. 59, *S. C.*; 49 Am. Rep. 305.
Rogers v. *Gage*, 59 Mo. App. 107.

Moreover, there is no evidence to show that there were any increase from the sheep attempted to be mortgaged to appellees. The burden is upon the mortgagee to show that there were increase, if any, from the specific animals mortgaged; and in the absence of such proof the presumption is there were none.

Gammon v. *Buel*, 53 N.W. 340.

Further, if there were increase there is no evidence showing that any of them were in the herd at the time of the attachment levy or at the time of the decree herein. The evidence shows that at the time of the attachment levy of Riordan Mercantile Company, there were in said band of sheep, carrying said marks, only one thousand head of sheep remaining which were in existence when the mortgages of the appellees were executed. (Rec., p. 105.) There is no evidence to show and no way of ascertaining how many of

this number remaining were attempted to be mortgaged to each appellee or how many in said number were left unencumbered. Moreover, there is no evidence to show that a single sheep of this number remained in the band on the day of the decree. The appellees now attempt to supply the shortage in numbers of sheep originally described in their respective mortgages by substitution. The oral agreement with Fulton was that the increase of the sheep attempted to be mortgaged should be substituted. The evidence is that this was never done. So the Court does the substituting in its decree, and attempts to include in the substitution every sheep in the Fulton band not attempted to be included in mortgages of appellees, and every sheep that was added to the band from any and all sources, by purchase or otherwise, regardless of age, sex, or character, from July 10, 1890, to August 21, 1894, even rams; and holds this substitution good against these appellants. The proposition seems to us preposterous.

"Substituted property is not held by virtue of the mort-
" gage, but by virtue of the agreement of the parties whereby
" an equitable lien, cognizable only in a Court of Equity,
" arises in favor of the mortgagee."

Jones on Chattel Mortgages, Sec. 154.
Pingrey on Chattel Mortgages, Sec. 130.
Pomeroy Eq. Jur., Sec. 1235.
Simmons v. *Jenkins*, 76 Ill. 479.

"There can be no substitution or exchange of property
" by the parties to the mortgage that will bind third parties,
" unless the mortgagee takes actual possession of the sub-
" stituted articles before the rights of third parties inter-
" vene."

Jones on Chattel Mortgages, Secs. 154 and 62.
Pingrey on Chattel Mortgages, Secs. 129, 130, 148, and 214.
Cobbey on Chattel Mortgages, Sec. 158.

Pomeroy Eq. Jur., Sec. 726.
Hunt v. *Bullock*, 23 Ill. 258.
Powers v. *Freeman*, 2 Lans. 127.
Simmons v. *Jenkins*, 76 Ill. 479.
Titus v. *Maybee*, 25 Ill. 232.
Rhines v. *Phelps*, 8 Ill. 455.

The evidence in this case is uncontradicted that no possession was ever taken by the appellees, either of the sheep attempted to be mortgaged or of the increase or other sheep attempted to be substituted. (Rec., p. 104.)

Substituted property must be identified same as original property described in mortgage; only a mere executory contract exists, and substitution is not made until identification is complete.

"Where an equitable mortgage is claimed as result of an "agreement, there must be at the time such agreement is "made such an identification of the property that the equi- "table mortgagee may see with a reasonable degree of cer- "tainty what property it is that is subject to his lien. If "the evidence fails to show the particular property in a con- "troversy, to which the alleged agreement refers, so as to "identify it, it can not be ascertained to what property the "lien attaches, and the claim can not be allowed."

Pingrey on Chattel Mortgages, Secs. 143, 142.
Cobbey on Chattel Mortgages, Sec. 159.
Jones on Chattel Mortgages, Sec. 55.
Pomeroy Eq. Jur., Sec. 1235.
Lee v. *Cole*, 21 Pac. 819.
Payne v. *Wilson*, 74 N. Y. 352.
Fowler v. *Hunt*, 4 N. W. 481.
Newall v. *Warner*, 44 Barb. 258.

The evidence is this case shows conclusively that no identification of property attempted to be substituted was ever made at any time by any one. (Rec., p. 104.)

Description of substituted property must be as certain as

though originally embraced in mortgages; a certain number out of a larger number not good.

"To be held in equity, the description of the property "mortgaged must be certain.

"A valid lien in equity cannot be created upon goods "which are not specifically defined by the instrument "creating the lien."

Pingrey on Chattel Mortgages, page 198.
Jones on Chattel Mortgages, Sec. 172*a*.
Cobbey on Chattel Mortgages, Sec. 349.
Pomeroy Eq. Jur., Sec. 1235.
Fishbank v. *Van Dusez*, 22 N. W. 244.
Hughs v. *Menefee*, 29 Mo. App. 192.
Morrill v. *Noyes*, 56 Me. 458.

The description of the property attempted to be substituted was an uncertain number of increase out of a larger number of the same kind, no attempt being made to substitute *all* the increase, with nothing to show how many wethers, ewes or lambs, with no way for distinguishing; a part to one appellee and a part to the other, to make good an unascertained shortage in numbers of wethers, ewes, and lambs described in their respective mortgages. The attempted substitution must therefore be void for uncertainty of description. Moreover, if the mortgages of appellees are void for defective description, the attempted substitution must likewise be void.

Under Arizona Revised Statutes, Sec. 2364, which provides as follows: "No Chattel Mortgage shall have any legal force or effect, except between the parties, unless the residence of the mortgagor and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, shall be set out in the mortgage; and the mortgagor and mortgagee shall make affidavit that the mortgage is *bona fide* and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage,"

in view of foregoing facts and authorities, it is conclusive that the mere executory contract of substitution evidenced by the oral agreement with Fulton, lacking the statutory requirements of a Chattel Mortgage, was void as to the appellants Riordan Mercantile Company and Northwestern National Bank, and that the pretended substitution is of no avail against them.

Point V.

The trial Court held that the chattel mortgages of the appellees were mere securities for debt, and that the legal title to said sheep remained in defendant Fulton; and decreed that all the Fulton band of sheep, up to 6,000 head, those attempted to be mortgaged to appellee Arizona Central Bank, those attempted to be mortgaged to appellee John Vories, those not mortgaged to either, including ewes, wethers, rams, and lambs, should be sold, regardless of age or sex, at one sale, and the proceeds paid to the appellees in the ratio of five dollars to the Arizona Central Bank and one dollar to John Vories.

The evidence shows that the appellees did not have a joint debt or a joint mortgage; that their mortgages were not on the same property and that there was no community of interest between them. (Rec., p. 104.) Moreover, a chattel mortgage is something more than a mere security; it must cover specific property which must be identified at time of execution and upon which *only* it can be foreclosed.

"The object of a mortgage is to create a lien on certain "specific property and not to give a right to any property "whatever of the particular kind mentioned in it.

"The claim of the mortgage is to be enforced on the "identical property included in the mortgage."

Pingrey on Chattel Mortgages, Secs. 142.

Kelly v. *Reed*, 57 Miss. 89.

Stonebreaker v. *Ford*, 81 Mo. 539.

"A chattel mortgage is not a mere security for a debt and " in this is distinguished from a real mortgage; it is a con- " ditional sale of the specific chattels and operates to trans- " fer to the mortgagee the legal title, to be defeated only " by the full performance of the conditions. Upon breach " of the conditions the mortgagee may take possession of " the property and henceforth treat it as his own; he may " sell it or give it away, squander or destroy it."

Cobbey on Chattel Mortgages, Sec. 4 and citations.
Jones on Chattel Mortgages, Sec. 1.
Pingrey on Chattel Mortgages, Sec. 1.
Herman on Chattel Mortgages, Sec. 1.
Heyland v. *Badger*, 35 Cal. 404.
Wright v. *Ross*, 36 Cal. 414.
Pomeroy Eq. Jur., Sec. 1229.
Parshall v. *Eggert*, 54 N. Y. 18.
Blake v. *Corbett*, 120 N. Y. 327.
Tompkins v. *Batie*, 11 Neb. 147.

The trial Court must have realized, when it came to make the decree, the weak and uncertain description of the property attempted to be mortgaged to appellees. It could not foreclose the mortgages on specific sheep, and could not divide the sheep; in order, then, to avoid this difficulty the Court ordered the whole band sold and pro rates the proceeds. Instead of divividing sheep, it divides money. The Court thus created a new contract for appellees to the damage of the appellants and irrespective of their rights.

We respectfully submit that the Court exceeded its jurisdiction in so doing. The judgment must be certain and specific as to the property to be sold under each mortgage. A "lump" judgment or omnibus judgment will not do. If the mortgages of appellees are valid liens, the appellants have the right to demand that each one be foreclosed on the specific sheep which it describes; and, if this cannot be done and a substitution is made, to demand that said substitution be made in accordance with the terms of the

agreement; that the specific numbers in each kind of sheep—wethers, ewes, and lambs—as stated in said mortgages, be made good by corresponding wethers, ewes, and lambs from the increase, if there be any, of the ewes originally attempted to be mortgaged to appellees, and to demand that all increase not so substituted, and all increase from other sources, and all sheep which are not the increase of said ewes, and all sheep not attempted to be mortgaged to said appellees originally, and all other sheep in the herd, be adjudged to said appellants. The decree and judgment of the trial Court must fall.

Point VI.

There is no evidence in the case that appellant Northwestern National Bank had any actual or constructive notice or knowledge of any of the alleged conversations, transaction, and dealings or equities between appellees Fulton and the Arizona Lumber and Timber Company; but the Court holds that the insertion made in the mortgage of January 4, 1893, was constructive notice to this appellant. This recital in the mortgage was made by and at the instance of appellees, and was an obligation on the part of the Arizona Lumber and Timber Company to appellees, who were third parties. It was not an obligation on the part of Fulton, nor was it an agreement between the Arizona Lumber and Timber Company and Fulton. No consideration passed from or to the defendant Fulton for the same. It was a matter which concerned appellees of the one part and the Arizona Lumber and Timber Company of the other part, and related only to the lien of that particular mortgage, and could have no effect whatsoever aside from the foreclosure of that mortgage of January 4, 1893. (Rec., p. 105.) Appellant Northwestern National Bank was an assignee before maturity—an innocent purchaser

for value—of the negotiable promissory note of August 30, 1893, secured by mortgage (Rec., p. 105), and took it as such, free from all equities which existed between the original parties to the note and mortgage, as seems to be well settled by the courts. How much more right or equities would a third party have than the original parties to the instrument?

Cobbey on Chattel Mortgages, Sec. 650.
Pingrey on Chattel Mortgages, Sec. 775.
Jones on Chattel Mortgages, Sec. 503.
Wiltsie on Foreclosure, Sec. 351.
Sawyer v. *Prickett*, 86 U. S. 146.
Kenicott v. *Supervisors*, 83 U. S. 452.
Carpenter v. *Longan*, 83 U. S. 271.
Munday v. *Whittemore*, 15 Neb. 647.

The mortgage in which this recital occurs as to keeping the appellees' mortgages good from increase covered other property besides the sheep mortgaged. (Rec., p. 104.) When the mortgage of August 30, 1893, was executed it appears from the evidence that a large credit was made on the former mortgage of January 4, 1893, and it was in fact relinquished so far as the sheep were concerned. (Rec., p. 105.) It was not satisfied on the record, however, because it covered other property, and the debt was not fully paid. But when Arizona Lumber and Timber Company declared to Northwestern National Bank that the mortgage of August 30 was a first lien on *all* the sheep (Rec., p. 105), Arizona Lumber and Timber Company relinquished its right to all of the sheep under the mortgage of January 4, and now makes no claim to any of said sheep under said mortgage. That mortgage then was dead, so far as the Northwestern National Bank was concerned. Even if it had actual notice of this alleged contract, and afterward learned from Arizona

Lumber and Timber Company that they had relinquished the sheep under that mortgage, then that mortgage would have been of no further vitality so far as the sheep are concerned, and notice under that mortgage, which was in fact by the acts aforesaid released on the sheep, was no notice at all, constructive or otherwise.

The position of appellees that this recital in the mortgage of January 4, 1893, was binding notice to all subsequent mortgagees and assignees of said mortgagees, is untenable for another reason. If it was notice of anything it was only of an executory contract of attempted substitution of other property in their mortgages, which substitution was never made in fact; or, it was notice of an attempted substitution, the terms of which were so indefinite as to be insufficient to impart notice.

Fowler v. *Hunt*, 4 N.W. 481.
Newall v. *Warner*, 44 Barb. 258.
Pomeroy Eq. Jur. 1235.
Pingrey, Secs. 142 and 143, pp. 118 and 120.

If such substitution had been of a definite and specific character, it would still be unavailing against this appellant as constructive notice, because no possession was ever taken of the substituted property.

Cobbey, Sec. 158.
Pingrey, Secs. 129 & 130, 148 & 214.
Jones, Secs. 62 & 154.
Pomeroy's Eq. Jur., Sec. 726.
Maier v. *Davis*, 15 N.W. 187.
Simmons v. *Jenkins*, 76 Ill. 479.

Actual notice of a mortgage invalid by a defective description would have no legal effect as against this appellant.

Jones on Chattel Mortgages, Sec. 309.
Barr v. *Cannon*, 28 N.W. 413.

How much effect, then, could a mere executory contract of substitution with defective description have?

There is still another reason why the mortgage held by appellant Northwestern National Bank was superior to the mortgages of appellees.

The evidence shows that of the original sheep mortgaged to appellees there was not more than one thousand remaining; that none of the wethers originally mortgaged were in existence at the time the suit was commenced. (Rec., p. 105.) Moreover, there is no evidence that there were any increase from the sheep described in mortgages of appellees; in the absence of specific proof of there being increase the presumption is there were none.

Gammon v. *Buel*, 53 N. W. 340.

If there were increase from said sheep attempted to be mortgaged to appellees there is no evidence that any of said increase were in the herd at the time of the execution of the mortgage owned by this appellant, or at the time of the decree. So that even if this Court should hold that the recital in the mortgage of January 4, '93, was constructive notice to this appellant, yet the decree rendered by the trial Court could not stand, because the trial Court held that this appellant's mortgage was subject to appellees' mortgages on all the sheep then existing, without regard to number remaining or to the different kinds. *In re "Allen's Estate," supra.*

Moreover, we contend that there is no question of notice here involved apart from an assignment or foreclosure of the mortgage of January 4, 1893, neither of which conditions exists. The appellees acquired no new rights by virtue of the recital in said mortgage, except as against the mortgagee therein when he should proceed to foreclose same. The terms of their own mortgages were not changed and

could not be changed thereby, and they acquired no better rights against any other mortgage subsequently made, or against any other claim of any nature attaching to said property, or against any parties whomsoever, than were already theirs by virtue of their said mortgages. They are protected so far as the mortgage of January 4, 1893, is concerned, but as against all other mortgages and claims whatsoever by whomsoever made, they must stand or fall by their mortgages as they were originally executed.

Point VII.

The Court erred as set forth in seventh specification for each and all of the reasons hereinbefore assigned, and for the further reason that the judgment and decree of the Court is not supported or sustained by the evidence.

The evidence shows that the mortgage of the Arizona Central Bank, appellee, covered only five thousand head of sheep, and that the mortgage of appellee Vories covered only one thousand head of sheep, whereas at the time said mortgages were made and delivered said Fulton, the mortgagor, owned sixty-two hundred head of sheep, of which said mortgagees had notice at the time of the making and delivery of their mortgages (Rec., p. 104); that after the delivery of said mortgages said Fulton, the mortgagor, had sold and butchered over seventeen hundred head of said sheep, of which said appellees had notice and to which they both consented (Rec., p. 104); that many more of said sheep had strayed away, become lost, and that many others had died, and that at the time of the institution of this action there did not remain of said sheep so mortgaged to exceed one thousand head. (Rec., p. 105.) And yet the Court held that all of the sheep on hand at the time of the decree, up to 6,000 head, irrespective of age, sex, or character, in-

cluding all increase and all sheep in the band regardless of their origin, and all sheep not included and not attempted to be included in said mortgages of appellees, *even all the rams*, should be sold to satisfy said mortgages of appellees, regardless of the rights of these appellants. (Rec., p. 106.)

The evidence fails to show how many sheep of any age, sex, or character there were at the time said mortgages to appellees were delivered, except that there were sixty-two hundred all told; and fails to show anything regarding age, sex, character, or number at the time the decree was rendered; and fails to show that there were any sheep in the band at the time of the decree that were in existence when mortgages of appellees were executed. The Court could not, therefore, decide that the mortgages of appellees conveyed, respectively, five thousand sheep and one thousand sheep in the Fulton marks. The evidence fails to show that there were any increase from said sheep, and if there were increase the evidence fails to show that they were in the band at the time of the decree, and shows that they were not included in said mortgages, and could not be included in the decree foreclosing said mortgages. The evidence clearly shows that more than four thousand head of the sheep in the band when the decree was rendered were not in the band when said mortgages of appellees were executed, and there is no evidence to show that any of these four thousand head are the increase of the sheep attempted to be mortgaged to said appellees. (Rec., p. 105.) These four thousand head were therefore not included in said mortgages, and could not be included in decree foreclosing same. The evidence shows that even had a substitution been made at the time of the attachment levy of appellant Riordan Mercantile Company, there would have been a surplus of ewes, rams, and lambs, and a shortage of wethers. Recourse to substitution is therefore unavailing, and the evidence shows that no substitution was ever made.

The Court also erred for the reason that the evidence shows conclusively that at least four thousand head of the sheep included in the attachment levy and sale of Riordan Mercantile Company were not included in the mortgages of said appellees, or either of them. (Rec., p. 105.) The Court could not therefore decree that the property attached by appellant Riordan Mercantile Company was the same as conveyed by mortgages of appellees and that its rights were subject to those of appellees. The evidence also shows that from the description of the property in said mortgages of appellees it was impossible to distinguish or identify the property attempted to be conveyed thereby, and there is no evidence that any one knew what property was attempted to be conveyed thereby, save from the mortgages themselves. The Court could not therefore adjudge that appellants Arizona Lumber and Timber Company and Riordan Mercantile Company had actual notice of what said property was. The evidence shows that defendant Fulton was not indebted to appellant Riordan Mercantile Company at the time of the pretended agreement between appellees and appellant Arizona Lumber and Timber Company, that said Riordan Mercantile Company was not a party or privy to said agreement, that said wool release was made to Arizona Lumber and Timber Company, and fails to show that Riordan Mercantile Company received any consideration of any kind, at any time, from said appellees, or from any one else, for any such agreement. (Rec., p. 105.) The Court could not, therefore, adjudge that appellant Riordan Mercantile Company was bound by said pretended agreement.

We therefore submit to the Court that the attachment lien of Riordan Mercantile Company and the mortgage owned by Northwestern National Bank are prior and subsisting liens to the alleged mortgages of appellees, and that the decree and judgment of the trial Court should not stand.

Before concluding, we ask the particular attention of the Court to the following cases, decided subsequent to the decree in this action, in which the points at issue are very similar to those raised in this cause:

Avery v. *Popper*, 34 S. W. (Tex.) 325.

McDonald v. *Tower Lumber and Mfg. Co.*, 38 Pac. 1122.

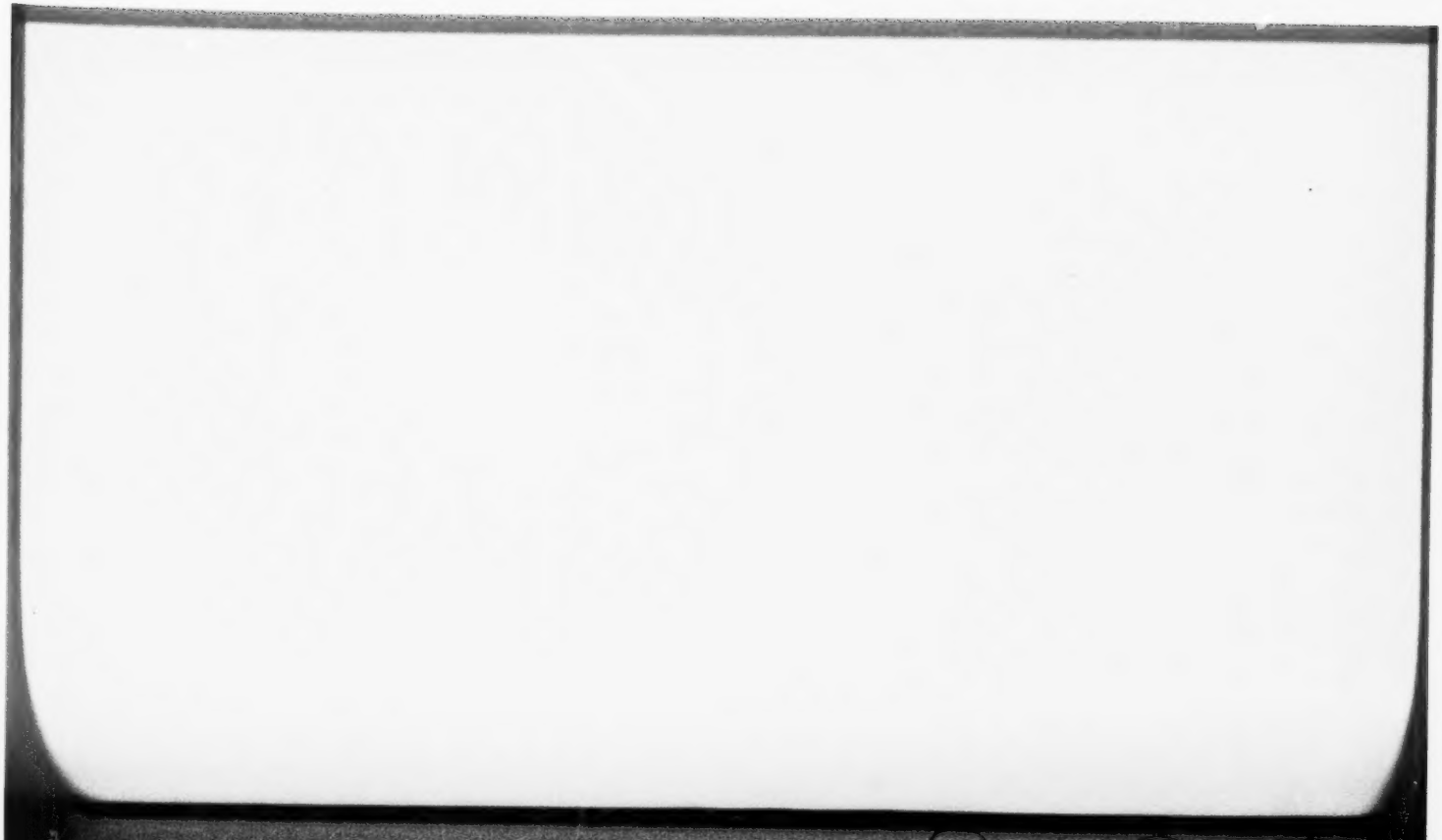
Point VIII.

The liens of the appellants specifically cover *all* of the sheep in controversy (Rec. 218 and 219) and are prior and subsisting liens to the mortgages of appellees. The judgment of the Supreme Court of Arizona affirming the judgment of the trial Court should be reversed and the liens of the appellants, in the order of their legal standing, should be given priority on all said sheep over the alleged claims of said appellees.

Respectfully submitted.

E. E. ELLINWOOD,
Attorney for Appellants.

A. T. BRITTON,
A. B. BROWNE,
Of Counsel.



No. 209.

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OCTOBER TERM, 1897.

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER AND TIMBER COMPANY,
APPELLANTS,
v.
B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, CO-PARTNERS, AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES.

No. 209.

Appeal from the Supreme Court of the Territory of Arizona.

REPLY BRIEF FOR APPELLANTS.

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E. E. ELLENWOOD,
Attorneys for Appellants.

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1898.

IN THE

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I.

The errors are sufficiently assigned. Each error relied upon by the Northwestern National Bank, independent of

its co-appellants, is distinctly so stated, as will appear from assignments II, III (Rec. 108); VII (Rec. 110); XVII (Rec. 113). This is all-sufficient under the very authorities quoted at length in opposing brief. Under such circumstances, the applicable rule is well stated in *Ency. of Pleadings and Practice*, Vol. 2, p. 933, thus:

"An assignment united in by several parties against "whom a joint judgment has been recovered, should be "considered as joint and several, or joint or several, ac- "cording to the nature of the error assigned, and as af- "fecting the respective plaintiffs in error."

II.

The findings of fact made by the Supreme Court of Arizona are conclusive here both upon Court and parties litigant. This has been the consistent ruling since the passage of the act of 1874 requiring such finding of facts by the Territorial Supreme Courts.

Zeckendorf v. *Johnson*, 123 U. S. 617.

Idaho and Oregon Land Co. v. *Bradbury*, 132 U. S. 509, 514.

San Pedro, etc., Co. v. *United States*, 146 U. S. 120, 130.

Mammoth Mining Co. v. *Salt Lake, etc., Co.*, 151 U. S. 447, 450.

Haws v. *Victoria Copper Mining Co.*, 160 U. S. 303, 313.

Gildersleeve v. *New Mexico Mining Co.*, 161 U. S. 573, 577.

Bear Lake Irrigation Co. v. *Garland*, 164 U. S. 1, 18.

In all the foregoing cases it is expressly held that the Court cannot go into the evidence at large, but is restricted to the findings; to errors alleged in exclusion or admis-

sion of evidence on which same are based, and to determination of the correctness or incorrectness of the judgment or decree below as based upon such findings. The rule as thus firmly settled is in accord with the uniform construction of similar statutes as applied to cases in admiralty, equity, or at law.

The Abbotsford, 98 U. S. 440.

Hence discussion of the evidence in this record *aliunde* the findings indulged in opposing brief is not admissible, and requires no reply.

The ultimate fact found by the Supreme Court of the Territory that the Northwestern National Bank, by its purchase of the note and mortgage of August 30, 1893, became "an innocent purchaser for value," is controlling. (R. 105.) The pleadings deny that the mortgages of appellees were valid or were recorded as alleged. (Answer of Northwestern National Bank, par. 3, R. 35; of Arizona Lumber and Timber Co., par. 3, Rec. 31; and of the Riordan Mercantile Co., par. 3, R. 26.) There is no affirmative finding by the Supreme Court of the Territory that *any* of the mortgages here involved were so recorded, and the ultimate finding of the Court *supra* that the Northwestern National Bank became "an innocent purchaser for value" of the note and mortgage held by it is conclusive that no notice of any prior mortgages in law or fact reached the bank, or that it could be chargeable therewith.

III.

A mortgage void as to third parties, by reason of uncertainty, is, of course, good as between the parties. The authorities on our original brief draw this clear distinction, and those cited on opposing brief are to the same effect.

The established rule of law is thus clearly applicable to the case at bar, and in favor of appellants.

IV.

The appellees' mortgages did not cover the increase. No mention thereof is made in them, and the insistence, by the appellee bank, that the subsequent mortgage of January 4, 1893, to appellant, Arizona Lumber and Timber Company, should contain recital that the sheep purporting to be covered by appellees' prior mortgages with respect to numbers should be kept good out of increase, was a new agreement and is a record admission which estops the appellees from asserting that such mortgages *did* cover such increase. The authorities on our original brief demonstrate that as the Northwestern National Bank is in the position of a *bona fide* purchaser under the express finding of the Court, the present claim of appellees that any increase of the sheep claimed to be covered by their motgages is subject thereto, as against that bank at least, cannot be sustained.

V.

We fail to perceive wherein the appeal of the Riordan Mercantile Company is subject to dismissal because of the alleged deficient jurisdictional value involved in its claim. The suit was brought by the appellee bank to foreclose its own mortgage, and its prayer was, *inter alia* (R. 9), that the property be sold by the decree of the Court "and for "distribution under such decree and disposition thereof "as the Court may make."

The decree entered below and affirmed in the Supreme Court of the Territory (Rec. 44) directs the sale and distribution of the proceeds by the sheriff in stated order.

This, in effect, brought the entire fund within the control of the Court. The property and fund involved thus admittedly amounts to the full jurisdictional sum required. Distribution of the whole fund among the parties litigant, and as their equities may be finally marshalled, gives full jurisdiction here of the entire case on behalf of all appellants.

Estes v. *Gunter*, 121 U. S. 183.
Handley v. *Stutz*, 137 U. S. 366, 369.
Texas Pacific Railway Co. v. *Gentry*, 163 U. S. 353, 363.

Respectfully submitted.

A. T. BRITTON,
A. B. BROWNE,
E. E. ELLENWOOD,
Att'ys for Appellants.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1897.

THE NORTHWESTERN NATIONAL BANK, THE RIORDAN MERCANTILE COMPANY, AND THE ARIZONA LUMBER AND TIMBER COMPANY,

Appellants,

vs.

B. N. FREEMAN, F. L. KIMBALL, AND J. H. HOSKINS, CO-PARTNERS AS THE ARIZONA CENTRAL BANK, AND JOHN VORIES,

Appellees.

No. 209.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR B. N. FREEMAN ET AL., CO PARTNERS AS THE ARIZONA CENTRAL BANK.

Preliminary to the discussion of the alleged errors assigned by appellants, we contend that as this case now stands, no error specified by these appellants should

be considered by this court which does not affect the rights of all of them.

The rule adopted by the state courts may be stated as follows: "Where several parties unite in one assignment of errors, they will encounter defeat unless the assignment is good as to all. If the errors affect the parties severally and not jointly, the proper practice is for each party to assign errors, for the rule is well settled that a joint assignment will not permit one of several parties to avail himself of errors upon rulings which affect him alone, and not those with whom he should unite in the assignment." (Elliott's App. Prac., section 318.) Appellants have joined in one assignment of errors.

"Come the said appellants in the above entitled cause, and say that there is manifest error in the record and proceedings in said cause, and do hereby note, specify and assign the same as follows:" (Tp., page 107.)

The record also discloses that the defendant, Fulton, appeared by his attorney, E. E. Ellinwood, and filed his separate answer. (Tp., page 18.)

The defendant, J. J. Donahue, appeared by his attorney, E. E. Ellinwood, and filed his separate answer. (Tp., page 19.)

The appellant, The Riordan Mercantile Company, appeared separately, by its attorney, E. E. Ellinwood, and filed its answer. (Tp., page 26.)

The appellant, The Arizona Lumber and Timber Company, appeared by the same attorney, and filed its answer. (Tp., page 30.)

The appellant, The Northwestern National Bank, appeared by its attorneys, Herndon & Morris, and filed its separate answer. (Tp., page 35.)

Decree was rendered, and all the above named appellants joined in motion for new trial, alleging as grounds therefor, errors in the decree and rulings of the court, made during the trial. (Tp., page 81.)

In appeal from the District Court of the territory to the Supreme Court of the territory, the appellants, The Arizona Lumber and Timber Company and The

Riordan Mercantile Company, joined in assigning error (Tp., page 83); and the appellant, The Northwestern National Bank, assigned separate error. (Tp., page 88.)

Upon the affirmance of the case, all the above named appellants joined in a motion for rehearing. (Tp., page 99.)

Thereafter all these appellants joined in application for an appeal to this court. (Tp., page 102.)

Although the appellant, The Northwestern National Bank, assigned error separately from the other appellants in the appeal from the District Court to the Supreme Court of the territory, yet this court has held that "the assignment of errors on the appeal from the District Court to the Supreme Court of the territory cannot be accepted in this court as the equivalent of the assignment required by the statute." (Benites vs. Hampton, 123 U. S., 519.)

While that case was brought to this court upon writ of error," and this case is brought upon appeal, yet this court has decided that "the rules, regulations and restrictions are the same as to appeals as in cases of writs of error." (Farrar vs. Churchill, 135 U. S., 609.) "And appeals are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases or writs of error." (Rev. Stat., section 1012.)

We therefore urge, upon the authority of the last two cases, that appellants are confined to the errors alleged upon the appeal from the Supreme Court of the territory to this court, and if the rule above contended for is adopted by this court, the rights of the appellants stand upon the same footing.

This court has said, in Phillips, etc. Construction Co. vs. Seymour, 91 U. S., page 646: "The object of the rule requiring an assignment of errors is to enable the court and opposing counsel to see on what points the appellant's counsel intend to ask a reversal of the judgment, and to limit the discussion to those points."

This practically states the purpose of any and all pleadings, and the above statement in fact defines the

assignment of errors required by the rule, and the statute, as a pleading.

"It is a rule of practice essential to the orderly administration of the law that all who join in a motion or pleading must show a right to the relief demanded. The rule applies to complaints, answers, demurrers, motions for new trials, and other matters of procedure. Again and again has it been applied to assignments of error."

Wall et al. vs. Bagby, 126 Ind., 372, citing numerous cases.

"In this court the assignment of errors constitutes the complaint of the appellants, and, like a complaint in a trial court, it must be good as to all who join therein, or it will not be good as to any of them. Where two or more appellants join in one assignment of errors, if they jointly complain, in any specification or paragraph of such assignment, of a ruling against one of them only as error, such specification or paragraph of error cannot be sustained as to any one, because it is not well assigned by all who have joined in such assignment."

Walker et al. vs. Hill, 111 Ind., 223.

To the same effect:

Hinkle vs. Shelley, 110 Ind., 88.

Kimbrel vs. Rogers, 90 Ala., 339.

Rudolph vs. Brewer, 96 Ala., 189.

Gordon et al. vs. Little, 41 Neb., 215.

Small et al. vs. Sandell, 45 Neb., 306.

Harold vs. Moline Milburn Co. (Neb.), 63 N. W. R., 939.

Hillens et al. vs. Brinsfield (Ala.), 21 So. R., 208.

This rule is in harmony with the general principle of pleadings. "An assignment of errors is in the nature of a declaration."

2 Tidd's Practice, 1168.
3 Bacon's Abr., 368.

"A plea which is bad in *part* is bad *in toto*, if therefore two defendants join in a plea which is sufficient for one but not for the other, the plea is bad as to both, for the court cannot sever it and say the one is guilty and that the other is not, where they all put themselves upon the same terms."

Chitty Pleadings, * page 594.

This rule is so universally adopted as to pleadings that the citation of authorities seems unnecessary, and the only question is whether this court will adopt the rule that the assignment of errors is in the nature of a pleading.

Neither are we limited to authorities from the state courts, applying the general rule of pleading to assignment of errors. "In respect to the after-acquired property, it is not claimed that the mortgage was invalid or ineffective as between the parties to the instrument. If, therefore, the court erred in extending the lien of the mortgage over property of that kind, the judgment creditors alone were harmed by the ruling, and the error should have been assigned by them, or in their behalf, only."

Grape Creek Coal Co. et al. vs. Farmers' Loan and Trust Co., 12 C. C. A., 350; 24 U. S. App., 38; 63 Fed., 891.

McDonald vs. U. S., 12 C. C. A., 339; 24 U. S. App., 25; 63 Fed., 426.

It will be observed that the question in the above case, from which we quote, was the same question which is the principal matter of contention in this case, viz., as to whether the mortgage shall extend in that case to the after-acquired property, and in this case to the increase; and we apprehend there can be no doubt as between the appellee bank and The Arizona Lumber and Timber Company, which took its mortgage in terms sub-

ject to the rights of appellee bank, that the judgment in this case, extending the mortgage to the increase, is correct, and if The Northwestern National Bank claims rights not common to the other appellants, error should have been assigned by it only.

If this court adopts the view that by reason of The Northwestern National Bank having joined in assigning error with the other appellants, and by reason of its other acts of joinder with them, it has placed itself upon the same terms with the other appellants, there are practically only two questions presented by appellants' assignment of errors.

First—Was the appellee bank's mortgage void for uncertainty of description?

Second—Did its mortgage extend to the increase, the mortgage in terms being silent as to increase?

The first question is raised by assignment of errors, as to the introduction of the mortgage in evidence, and on motion to strike at the close of the case.

> Assignments II. and V., Tp., pages 108 and 109.

Whether or not this was error, depends upon the facts appearing in the case.

We contend that the description, so far as appellee bank's mortgage is concerned, was made definite and certain by subsequent events.

The only testimony as to the number and character of this band of sheep at different times, from the date of appellee bank's mortgage, July 10, 1890, to the date of the decree, was given by defendant, Fulton.

We quote the entire testimony on this subject, as to the character and numbers of the sheep from July 10, 1890, to December 18, 1893.

Fulton testified, on direct examination, on behalf of plaintiffs: "I took the inventory at the time of the attachment, on the 18th of December, '93. I counted the sheep in connection with the sheriff. The sheep are between thirty and forty miles south of here, in Coconino county. The record shows the number of sheep on that

date. I can not tell separate and apart from the records. I made the proper inventory, which was delivered to the sheriff. There is no change in the sheep from January 3rd, 1893, to December 18th, '93, except from the natural loss on the range. May and (Tp., page 58) June is the lambing season. The lambs specified in the inventory mean the lambs of '93; the May and June lambs. At the time of the giving of the mortgage in 1893 the sheep were estimated.

"Q. If there were 2,926 ewe sheep on the 18th of December, how many would there be on January 3rd, '93? And state how you would estimate it.

"Objected to as incompetent and immaterial. Objection overruled; to which ruling of the court said defendant excepted.

"A. It is difficult to arrive at any such number. If among ewes, the loss is comparatively light for that particular season. I presume one hundred head would be the conservative number to estimate.

"Q. How about the wethers? A. There is a loss comparatively slight of them.

"Q. If there were nine hundred on the 18th of December, how many would there have been on January 3rd? A. Of course there is butchering along from time to time for commercial use, and that would be for eleven months, possibly say 88 or 90 head up to that date, in round numbers.

"Q. And the lambs, 1,287. Were the lambs of the increase occurring in May and June? A. In May and June.

"Q. There were none sold from January 3rd, 1893? A. No." (Tp., page 59.)

On cross examination he testified:

"At the time the attachment was levied by the sheriff, December 18th, 1893, I had none of the male sheep that were included in the Hoskins and Vories mortgages, and the lambs described by the sheriff are the lambs of the year 1893. In the season of 1891 there was an unusually heavy loss among ewes. I have to approximate how many there were. I presume a thousand head would

be in existence on December 18th, '93—I mean a thousand head of those ewes I mortgaged in July, 1890. These were not included in the increase, and there were no male sheep. I can't say about the dry ewes. There might be some in the band in '90 that would not be there afterwards." (Tp., page 66.)

Inventory showed ewes	2,926
Add for natural loss from January 3 to December 18	100
Inventory showed wethers	900
Add for loss, butchering, etc	90
Total, January 3, 1893	4,016

None were sold during the interval elapsing between January 3 and December 18, 1893. The lambs mentioned in the inventory were of May and June of that year.

The male sheep of July 10, 1890, had all been sold, butchered or had died, but none were sold during that interval, and only eighty-eight or ninety butchered.

It will be observed that appellee bank's mortgage covered the lambs in existence on July 10, 1890, and the bearing ewes in existence on July 10, 1890, the non-bearing ewes being included in the Vories mortgage, and designated as "dry" ewes, to distinguish them from the bearing ewes.

It follows that the sheep in existence on January 3, 1893, were one thousand of the bearing ewes of July 10, 1890, to which must be added the one hundred dying from natural causes between January 3, 1893, and December 18 of that year, with their natural increase, and the increase of such of the six hundred bearing ewes that bore lambs before their death during the interval elapsing between July 10, 1890, and January 3, 1893, together with such of the lambs as remained of July 10, 1890.

There can be no other conclusion from this testimony than that the sheep in existence belonging to Fulton on the 3d day of January, 1893, and covered by a second mortgage to appellant, The Arizona Lumber and Timber Company, were either those bearing ewes and

lambs covered by the appellee bank's mortgage, or their natural increase, and the entire number at that date did not exceed 4,016 sheep, while all of the male sheep covered by both appellees' mortgages had died, or been sold or butchered.

The mortgage of January 4 was recorded on January 5, and continued of record, unsatisfied, to the date of the decree, and the appellant, The Arizona Lumber and Timber Company, have a decree for the amount unsatisfied, amounting to the sum of $418. Although the appellee bank did not go to the range where the sheep were ranging, and with the defendant, Fulton, go through the ceremony of saying these are the increase which are the increase of the original bearing ewes, and therefore are subject to your mortgage, according to our agreement, yet he did, in the most solemn way, by his recital in the mortgage of January 4, 1893, designate, identify and point out that his entire band was subject to the mortgage of appellee bank.

A mortgage of a certain number out of a larger number is not *void*, but is valid between the parties and gives grantee right of selection on the ground that the instrument is construed most strongly against the grantor, and some intention must be given the instrument.

"A mortgage conveying 50 mares, branded F2, where the mortgagor owns 300 such mares, and there is no means of determining which ones of the 300 were intended to be mortgaged, is not void for uncertainty, and the mortgagee has the implied power to elect, as to which ones shall be deemed included in the mortgage."

Oxsheer et al. vs. Watt, 41 S. W. R. (Tex.), 46.

This case we commend both upon principle and authority.

"In Call vs. Gray, 37 N. H., 428, it was contended that a mortgage of a certain number of beds, chairs, etc., without any further designation, in a house containing many other articles of the same kind, was void, because

the instrument contained no description by which the property intended to be mortgaged could be designated; but the court held it valid, saying: 'The doctrine is same as that which prevails in conveyance of real estate,—that the grant shall be taken most strongly against the grantor. * * * The mortgagor had nothing further to do to make the mortgage perfect, and the plaintiff had the right to make a selection of the articles. The mortgage then, so far as the instrument itself went, was legal between the parties.'"

Oxsheer et al. vs. Watt, supra.

In support of this proposition are cited:

Elliott vs. Long, 77 Tex., 467; 14 S. W., 145.

Leighton vs. Stuart, 19 Neb., 546; 26 N. W., 198.

Frost vs. Bank, 68 Wis., 234; 32 N. W., 110.

We further cite in support of this proposition:

Jones (last paragraph), section 56.

Cobbey, section 183.

Herman, section 74.

Gurly vs. Davis, 39 Ark., 394.

Such mortgage is good as to parties having notice.

Cobbey, section 186.

Clapp vs. Trobridge, 74 Iowa, 550.

Oxsheer vs. Watt, supra.

Before any of the parties appellant had acquired any rights, there were only 4,016 sheep in the Fulton band, and it is immaterial if grantee had previously allowed grantors to make selection, and of this fact appellants can not complain.

The rights of appellants are to be determined by the circumstances existing at the time their rights were acquired.

Cobbey, section 186; Jones, 56*a*.

Leighton vs. Stewart, 19 Neb., 546.
Cole vs. Green, 77 Iowa, 307.
Clapp vs. Trobridge, 74 Iowa, 550.
Interstate Galloway Cattle Co. vs. McClain, 42 Kan., 680.
Elliott vs. Long, 77 Tex., Supreme C.

The property covered by appellee bank's mortgage was rendered definite and certain between the bank, Fulton, and Sisson, who was treasurer of both appellant companies, and there can be no doubt upon this proposition, if we resort to the testimony of the witnesses upon this subject, but we need go no further than to what the mortgage of January 4 itself discloses, to substantiate this proposition, taken in connection with the fact that there were only 4,016 sheep in the band on that day.

There is no controversy as to the proper description of the sheep in that mortgage, and can there be any doubt as to what property was meant by the term *above sheep* when taken in connection with the remainder of the mortgage?

It appears to us that the property was particularly separated, distinguished and identified by this transaction of January 4, 1893.

APPELLEE BANK'S MORTGAGE COVERED THE INCREASE.

The second proposition, as to whether or not the mortgage of the appellee bank shall extend to the increase, it in terms being silent as to increase, is raised by various assignments of error as to the admission of evidence, and the court's decree extending the same to the increase.

In so far as the mortgage of the appellee bank is concerned, we shall contend, as a matter of law, that independent of any contract of substitution, and by reason of their mortgage covering the bearing ewes, it likewise

covered the increase, as between Fulton and the bank and all parties having notice.

Between the parties to a mortgage, if the dam be under mortgage at the time of parturition, the mortgage extends to and covers the increase until the mortgage indebtedness is paid, and this is true although the mortgage is silent as to increase.

Jones on Chattel Mortgages, section 149.

Cobbey, section 366.

The brood of all tame or domestic animals belongs to the owner of the dam, or mother, and at common law, the increase or young of mortgaged animals belongs to the mortgagee.

Jones, C. M., section 149, and cases cited.

Cobbey, sections 365 to 368 and cases cited.

Pyeatt vs. Powell, 51 Fed., 551.

Arkansas Val. L. and C. Co. vs. Mann, 130 U. S., 78.

Fowler vs. Merrill, 11 How., 375.

The civil law has been adopted by most of the state courts, and is stated as follows:

"Although the mortgage be restricted to certain things, yet it will nevertheless extend to all that shall arise or proceed from that thing which is mortgaged, or that shall augment it, or make part of it. Thus, when a stud of horses, a herd of cattle, or a flock of sheep is put in pawn, into the creditor's hands, the foals, the lambs, and other beasts which they bring forth, and which augment their number, are likewise engaged for the creditor's security, and if the herd or flock be entirely changed, the heads which have renewed it are engaged in the same manner as the old stock." Domat, Civil Law (by Strahan), section 1663.

Cahoon vs. Miers, 67 Md., 573.

Moreover, the lien continues until the debt is paid, as between the parties, and to all parties having notice.

"The attempt has been made to draw a distinction when, during the time the property remained with the mortgagor, the offspring so increased in strength and maturity as to cease to follow the dam.

In such case it has been contended that the mortgage ceases to bind the offspring. We are at a loss to conjecture upon what principle such a distinction can be maintained. We apprehend, however, that all such seeming rulings rest upon an entirely different principle. The exception has been allowed only in favor of *bona fide* purchasers, who, finding such offspring in the possession of the mortgagor, arbiter of its own movements and not following its dam, purchased and paid for the same *without* notice of the mortgage lien."

Meyer et al. vs. Cook, 85 Ala., 417.

"There would seem to be no valid reason for terminating the lien, as against the mortgagor, merely because the period of 'suitable nurture' has passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mortgagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage."

Funk vs. Paul, 64 Wis., 35.

But it is contended by the appellants that it was incumbent upon appellee bank to show that there were increases from specific animals mortgaged.

We contend that it sufficiently appears from the "findings" that the sheep in existence on the day of the decree were either what remained of the original bearing ewes and their lambs of July 10, 1890, or their increase.

No other conclusion can be reached, if, for the sake of clearness, we place in juxtaposition those portions of the findings which refer to the number and character of the sheep at different times from July 10, 1890, to the day of the decree, and take such findings in connection with the fact that the entire record is absolutely silent

as to any purchase of sheep by Fulton, or of his acquiring any sheep by any other means.

"That on said day (July 10, 1890) Fulton owned and "possessed 6,200 sheep that were herded, and run together, "and those were all he owned, marked in the Fulton "mark, ———." "That said Fulton continued in the "ownership and possession of all of said sheep, save only "such as died, were sold by him, consumed or lost, until "the 18 December, 1893. At no time did appellees or "either of them ever take or ever have possession of said "sheep or of any of them or of the *increase thereof*, nor "were any of said sheep *or the increase thereof* ever by any "one identified, designated, or in any way segregated, ap"portioned or substituted to the or on account of the said "pretended mortgages or either thereof." "That on De"cember 18, 1893, The Riordan Mercantile Company at"tached sheep mentioned in inventory, same being all "the sheep then owned by said Fulton." "That on the "31st day of March, 1894, the sheriff *sold said property*, "and delivered the same to the appellant, Riordan Mer"cantile Company, who then entered into the possession "thereof, was still in the possession thereof when this "cause was tried in the lower court, and are still in the "possession thereof." (Transcript, folios 216 to 221.)

So far as appellees are concerned, they never made any claim to any sheep that were not the original mortgaged sheep or their increase, and this was one of the principal contentions in the case as to whether or not the appellee bank's mortgage should extend to and cover the increase. The first suggestion made in the entire record, that there was any possibility of any other sheep than those of the original sheep and the increase thereof, was made in appellants' brief filed in this court, while in the sixteenth assignment of error, one of the grounds therein mentioned is "that no possession was taken of "said increased number or of the number of the increase "that *it is adjuged* was agreed should be added to said "mortgage."

EFFECT OF RECITAL AS NOTICE TO THE NORTHWESTERN NATIONAL BANK.

In the event that this court should not sustain us in the position we have taken, that The Northwestern National Bank has placed itself upon the same terms with the other appellants, we still maintain that it had notice of the appellee bank's rights in and to the property in controversy, by reason of the recital in the mortgage of January 4, 1893, or at least had sufficient notice to put in upon inquiry, which, if pursued, and inquiry made at the proper source of information, would have disclosed the true state of the facts.

As before shown, the sheep in existence on the 4th day of January, 1893, numbered 4,016, and they were either the bearing ewes and lambs covered by appellee bank's mortgage of July 10, 1890, or their increase.

The situation of the recital, appearing as it does immediately following the descriptive clause of the mortgage, makes it certain at least that the entire band was bound for the payment of appellee's mortgage. After describing real estate, "also about three thousand ewes, one thousand wethers and two thousand lambs; same being all the sheep now owned by mortgagor and including all the wool and increase which may be produced by said sheep; all running on their accustomed range in Coconino county, marked, ewes, split in right ear, hole in left; wethers, reverse. (This being subject to a mortgage on five thousand of above sheep to Arizona Central Bank and on one thousand head and the residence property of Jno. Vories. Said number as described in mtgs. to be kept good out of increase)." (Tp., page 14.)

There can be no question about the correctness of the above description, for it says "being all the sheep now owned by the mortgagor," and all the authorities agree that the fact that there are less than what the mortgage calls for does not render the description uncertain. While the above recital does not, in terms, state that a large portion of the "above sheep" are increase, and thereby recite the true state of the facts, yet it does dis-

close that there is a mortgage on the entire flock, and points to the source of inquiry, namely, to The Arizona Central Bank. The mortgage of July 10 covered 1,600 ewes, and there were, on January 4, 1893, nearly twice as many ewes, but it will be observed that the term "above sheep" includes both sexes, and clearly shows the intent of the parties that the mortgage of July 10, 1890, should extend to and cover the increase. The mortgage of August 30, under which The Northwestern National Bank claims, in terms covers only 4,500 matured sheep, which is 500 less than the number which the recital described as being subject to a mortgage to the appellee bank, the lambs being the lambs of May and June of that year. (Tp., page 16.) The term *above sheep* can have no other signification than the above described sheep, which terms apply particularly to the mortgage of the appellee bank.

The legal question presented in this connection is, how far a mortgagee (or assignee) is bound by the recitals in other mortgages of record at the time his rights were acquired, executed by the person from whom he claims, if the recital purports to affect the same property.

a. Was it incumbent upon the appellant bank to examine the record?

b. Would an examination of the record identify or point out the property covered by the mortgage, or point to the source of information?

"There is no difference in principle between the effect of recitals in papers by which the title to real and personal property is transmitted, when the latter is conveyed or affected by written instruments. This is generally either where the title is acquired under a will, or a *chattel mortgage* or trust deed."

Wade on Notice, section 332.

The expression "had he examined the records," found in many authorities in speaking of third persons dealing with mortgaged property, would indicate that it is incumbent upon such persons to examine the records, and the fact that the note was negotiated in the distant

city of Chicago can not relieve the assignee of the ordinary precautions that a person would be required to take living in the vicinity at which the mortgage was given and the property situated.

"If the defendant had examined the records of Lincoln county, *as it was his duty to do*, he would have found the two mortgages dated November 9, 1885, in which the cattle were described by their ages and the marks and brands which they bore; and wherein it is stated that they are the cattle purchased by the plaintiff." "If he had examined the records of Jewell county, where the cattle were held at the time the mortgage to him was executed, and where King, who claimed to be the owner, resided, he would have learned the history of the transactions between the cattle company and Martin; but, instead of examining the records of either Lincoln or Jewell counties, *as ordinary prudence*, even, would dictate, he claims to have invested $10,000 in a roving herd of cattle that he had never seen, the owner of which he does not know, and without examining the records, to ascertain whether this stranger had a title to the cattle, or whether there were any existing liens upon them."

Interstate Galloway Cattle Co. vs. McLain, 42 Kan., 680.

In Kneller vs. Kneller, 86 Iowa, 417, the controversy was between mortgagee and attaching creditor without actual notice.

The recital in that case is nearly identical in terms with the case at bar, and is exactly to the same effect, and in both cases the recital refers to the *above* property.

"No useful purpose would be served by a review of the numerous cases in Iowa wherein the question of the sufficiency of the description of the property in a chattel mortgage has been discussed. We have carefully considered them. This case is unlike any of them in the fact that there is a recital in plaintiff's mortgage which, in effect, at least so far as *notice* is concerned, incorporates the prior mortgage into plainiff's mortgage.

"It seems to me that the recital in plaintiff's mortgage of the prior mortgage, coupled with the description given of the property in both mortgages, is sufficient to put the defendants upon inquiry; and it is admitted that such inquiry would have led to the identification of the property."

The question asked by the Supreme Court in that case, and answered in the above language, makes it incumbent upon the purchaser to look to the records and follow up any inquiry suggested thereby.

"Now, does this raise an inquiry that would of itself lead a reasonably prudent man to follow up the identity of the property?"

Where two mortgages are of record, one of which correctly describes the property and refers to the other as being upon the same property, the description of such other mortgage is rendered definite, and the record is sufficient to impart notice to the world.

"The description in plaintiff's mortgage without reference to that contained in the mortgage to Hay, was insufficient, but it was competent for the parties to refer to the description used in the Hay mortgage, and when both were filed for record, as the evidence shows they were in this case, were sufficient to impart notice to the world."

Thompson vs. Anderson, 94 Iowa, 554; citing
Newman vs. Tymeson, 13 Wis., 172;
Kneller vs. Kneller, supra.

This recital had this additional effect as to The Northwestern National Bank, in that its assignor, The Arizona Lumber and Timber Company had acknowledged by taking its mortgage in terms subject to that of the appellee bank, that all the sheep that Fulton owned in his mark and brand, were covered by a prior chattel mortgage to appellees.

To avoid the effect of the record of the recital, the appellants in their brief (page 25) are attempting to "let go" for The Arizona Lumber and Timber Company, and now claim that the mortgage of January 4, 1893, "was not satisfied on the record, however, because it covered

other property, and the debt was not fully paid. But when The Arizona Lumber and Timber Company declared to Northwestern National Bank that the mortgage of August 30 was a first lien on all the sheep, The Arizona Lumber and Timber Company relinquished its right to all the sheep under the mortgage of January 4, and now makes no claim to any of the said sheep under said mortgage. That mortgage was then dead, so far as The Northwestern National Bank was concerned."

It comes too late to now, for the first time, ask this court to "kill" the mortgage of January 4. Throughout this case these appellants have urged the rights of The Arizona Lumber and Timber Company, and it will appear from the record that this is the first time that they have made a concession that their mortgage was not prior to that of the appellees. The fact that Sisson, the treasurer of The Arizona Lumber and Timber Company, stated (Transcript, folio 161) to The Northwestern National Bank that the note was secured by a first mortgage on 6,000 sheep, when as a matter of fact the mortgage of January 4 was a prior mortgage and covered all the sheep, with the increase, might postpone the rights of The Arizona Lumber and Timber Company to the rights of The Northwestern National Bank, but it did not "kill the mortgage."

In this, the court very properly in its decree postponed the rights of The Arizona Lumber and Timber Company to those of The Northwestern National Bank, on account of the misrepresentations of Sisson.

Section 2369, Revised Statutes of Arizona, requires the mortgagee to discharge the mortgage of record when the same has been satisfied. "When the debt secured by any such instrument shall have been paid or satisfied, it shall be the duty of the mortgagee to enter or cause to be entered satisfaction thereof." There is no statute requiring a renewal to be filed in this territory, and a mortgage properly filed continues to be notice of everything it contains, until discharged of record, the same as a mortgage upon real property.

"Whenever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would

have discovered had he performed the duty. Means of knowledge with the duty of using them, are, in equity, equivalent to knowledge itself."

Cordova vs. Hood, 17 Wallace, 1.

It was *idle ceremony* for The Northwestern National Bank to rest its inquiry with Sisson, and the inquiry should have been made of the parties who would have been bound by their statements.

Cordova vs. Hood, supra.

The Northwestern National Bank took its mortgage with the constructive notice that its assignor had acknowledged the existence of a prior mortgage on all the sheep owned by Fulton.

The holder of a mortgage "in terms" made subject to another mortgage can not defeat it upon technical grounds, and his only defense to the same is that it has been paid.

Jones on Chattel Mortgages, 494.
Cobbey on Chattel Mortgages, 1038-1039, and cases there cited.
Eaton vs. Tuson, 145 Mass., 218.
Flory vs. Comstock, 61 Mich., 522.
Gammon vs. Buell, 86 Iowa, 954.
Cassidy et al. vs. Harrelson, 1 Colo. App., 458.
Clapp vs. Halliday, 48 Ark., 258.
Hoagland vs. Shampanor, 37 N. J. Eq., 588.

The rule in such case is that the second mortgage takes only the rights of the mortgagor, viz., to redeem from the first mortgage.

Cases cited last above.

If appellant bank had gone no farther than to what the record disclosed, it would have discovered not only that its assignor had taken a mortgage subject to appellees' mortgages upon the same property, but that its assignor had agreed with Fulton to keep said mortgages good in the future out of the increase.

Whether or not the fact of Sisson's signing the affidavit to the mortgage is equivalent to signing the contract is immaterial, it was the contract of said bank's assignor, nevertheless.

"A written agreement, although not signed by the parties, will, if orally assented to by them, constitute the agreement between them."

Dutch vs. Mead, 36 N. Y. Superior, 427.

Farmer vs. Gregory, 78 Ky., 475.

Bacon vs. Daniels, 37 Ohio St., 279.

Bishop on Contracts, section 342.

The acceptance of a conveyance containing a positive agreement to be performed by the grantee, binds the grantee with like effect as if he had signed the conveyance, and binds him although the agreement be made for the benefit of third parties.

Jones on Mortgages, section 752, and cases cited.

The mortgage shows that it was "filed at the request of F. Sisson." (Transcript, page 16.)

A party is presumed to have actual notice and to have consented to all that appears in his own conveyance.

Finlay vs. Simpson, 53 Am. Dec., 252.

The appellant bank can not escape the effect of notice by recital.

The recital appears in the mortgage taken by its own assignor from Fulton, from whom the said appellant bank now claims. The sheep in all the mortgages were designated by the Fulton brand and no other, which, by the statute of the territory is made *prima facie* evidence of ownership.

Section 2785, Revised Statutes of Arizona: "Every person being the owner of horses, mules, cattle, sheep, goats or hogs, shall have and keep a mark, brand and counter-brand different from the marks, brands and counter-brands of his neighbors."

Sec. 2786. "Every such owner shall record with the county recorder of his county, his mark," etc.

Sec. 2788. "On the trial of any action to recover the possession of any animal which is marked or branded as provided in this act, the brand shall be deemed *prima facie* evidence that the animal belongs to the owner of the mark and brand."

The brands made the description good, except as to the sexes, and as before observed, *above sheep* applies to all sexes, and does not limit it to the sexes described in the mortgage of July 10, 1890.

The simple fact that The Northwestern National Bank was taking a note secured by mortgage would in and of itself dictate to an ordinarily prudent man the necessity of examining the record of chattel mortgages, and if it was incumbent upon the said bank to make such examination, then it can not escape the notice conveyed by the recital.

It is no longer the rule that the description must be such that unaided by other evidence the property might be identified.

"A chattel mortgage duly acknowledged and recorded, after describing certain other chattels as then upon the farm of the mortgagor, contained this description, to-wit: 'Twenty two-year-old steers on same farm.' It was objected that this description was insufficient to identify the property as to others dealing with the mortgagor: Held that the record of the mortgage was sufficient notice to subsequent purchasers that the mortgagee had some claim of right to cattle upon the farm, and that parol evidence was necessary and admissible to identify the particular cattle."

Bell vs. Prewitt, 62 Ill., 361.

THE RIORDAN MERCANTILE COMPANY.

Its appeal must be dismissed for want of jurisdiction. According to its own contention "that the *attachment lien* of The Riordan Mercantile Company and the

mortgage owned by The Northwestern National Bank are prior and subsisting liens to the alleged mortgages of appellees" (appellant's brief, page 30), then its appeal must be dismissed if its demand be a lien, and its claims nothing by reason of the foreclosure of the same; for the amount of the claim is only $810.91. (Record, page 105.)

But in any event its appeal must be dismissed. The affidavit filed for the purpose of establishing the jurisdiction of this court states "that the value of said property exceeds the sum of $5000.00." (Record, page 103.) How much in excess of $5,000 the value of the property is, there is nothing in the record to show. There has been no contention, nor can there be any, but what the right of The Riordan Mercantile Company to participate in the fund arising from the foreclosure sale shall be postponed to that of The Northwestern National Bank, whose claim was adjudged at $5,875. (Record, page 44.) Whether The Northwestern National Bank's mortgage be adjudged first or second in priority, in order that the amount in dispute between The Riordan Mercantile Company and appellees, or either of them, should equal the jurisdiction of this court, the value of the property should exceed $5,000 over and above the claim of The Northwestern National Bank, as to which fact the record is silent.

The demands of appellants are separate and distinct, and as to each appellant, the matter in dispute, between it asserting on the one side, and the appellees denying on the other, must exceed $5,000, or the appeal must be dismissed as to it for want of jurisdiction.

Gibson vs. Shufeldt, 122 U. S., 27.

Smith Middlings Purifier Co. vs. M'Groaty, 136 U. S., 237.

Stewart vs. Dunham, 115 U. S., 61.

Ogden City vs. Armstrong et al., No. 127, Oct. Term, 1897; decided Nov. 29, 1897.

Its position, however, is no better than that of The Arizona Lumber and Timber Company, which took its

mortgage in terms subject to appellee bank's mortgage.

The findings of fact state that during all the transactions among the parties to this action, Sisson was treasurer of both appellant companies (record, page 106), and by reference to the testimony Sisson conducted all the transactions for both appellant companies. (Record, page 55.)

The finding of the District Court was that Sisson's agreement was on behalf of both appellant companies. (Record, pages 42 and 43.)

But as we understand the contention of this appellant, it claims that it was not represented at the transaction of January 3, 1893.

The indebtedness of Fulton to appellant companies was at that time evidenced by a note and chattel mortgage to The Riordan Mercantile Company, and was changed to and merged in the note of January 4, 1893, to The Arizona Lumber and Timber Company. (Record, page 57.) By a statement rendered to Fulton by the appellant companies, there was no distinction made between them, while The Riordan Mercantile Company gave the receipt to Fulton for the $3,000, proceeds of the wool released by appellee bank. (Record, page 60.)

A portion of the note and mortgage of August 30, 1893, was given for future advances, presumably to be made by the payee of the note, The Arizona Lumber and Timber Company, and on the following day there was $1,000 voluntarily endorsed on that note (record, page 61), and thereafter, it is claimed, advances were made to Fulton by The Riordan Mercantile Company. The amount of the judgment of The Riordan Mercantile Company was $810.91, nearly $200 less than Fulton was entitled to by advancements to be made from The Arizona Lumber and Timber Company, had this voluntary endorsement not been made.

Sisson having agreed on January 3, 1893, with appellee bank, that his companies were to continue to carry Fulton along, and make him sufficient advances to enable him to carry on business, in consideration whereof appellee bank released the wool then unshorn,

and of the net value of $3,000, and having foreborne foreclosure, makes the position of this appellant no better than that of The Arizona Lumber and Timber Company.

Under such circumstances, to allow Sisson, who had acted for and on behalf of one company, to turn about and make advances for and on behalf of another company of which he had the management, so as to defeat the agreement he had made for and on behalf of the other, would be a transaction which would not be upheld by a court of equity.

THE DECREE.

While this court has repeatedly decided, commencing with Stringfellow vs. Cain, 99 U. S., 619, down to decisions of the present term, that in an appeal from the Supreme Court of a territory to this court, the jurisdiction of this court on such an appeal, apart from exceptions duly taken on admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment; yet this court has recently said that if a "matter is left in some uncertainty as to the exact facts * * * we will not in such case indulge in any presumption unfavorable to the judgment and for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below."

> Bear Lake & River W. & I. Co. vs. Garland, No. 48, Oct. Term, 1896; decided Oct. 19, 1896.

This last rule has special application under the circumstances in this case.

While in this case the facts found by the Supreme Court do not as clearly present the case as could have been made from the undisputed facts in the case, yet it is not our fault. From the record it will appear that the findings of fact were filed on the 13th day of June, 1896 (record, page 107), and bond on appeal filed and ap-

proved on the 22d day of the same month. (Record, page 115.)

The findings purport to have been made in open court, the 4th day of May, 1896 (record, page 107), but where they were during the time elapsing between that day and the day of filing, the record does not disclose.

It further appears that attorneys for all the parties, except appellee bank, stipulated as to the facts. (Record, page 107.)

Under the established practice relating to bills of exceptions and other matters of this nature, opposing counsel are consulted, and given an opportunity to be heard; but in the present case it will be seen that there were only nine days elapsing between the time of filing the findings and taking the appeal, when the Supreme Court of the territory lost all jurisdiction of the case, and could not then alter the findings, and it is evident that the findings were not accessible to appellee bank during the time elapsing between May 4, the date when they purport to have been made, and June 13, the date they were filed.

While we claim that the ultimate facts found support the decree, yet the undisputed incidental facts should be referred to, to a clear understanding of the matters in controversy.

The only contention made as to the *insufficiency* of the findings to support the decree, is that it does not appear that there were increase of the original bearing ewes. As before stated, such fact sufficiently appears.

The fact actually found, that The Northwestern National Bank was an innocent purchaser of the $6,000 note, is urged as the ground of reversal on its behalf. We have discussed its position in relation to its having notice by reason of the recital in the mortgage of January 4, 1893. Its position, throughout this case, has been to aid the other appellants herein, rather than to collect its demands, which fact alone should place it on the same footing with the other appellants. If, as a matter of fact, the contention of the appellants that the mortgage of January 4, 1893, was killed, when Sisson stated

to The Northwestern National Bank that the mortgage of August 30 was the first mortgage, then, when it appeared undisputed, as it did at the trial, that $1,250, proceeds of the wool from the sheep covered by the mortgage of August 30, had been applied on the mortgage to The Arizona Lumber and Timber Company after it had ceased to exist, appellant, Northwestern National Bank, should have then insisted and should now insist upon its application to reduce its demand.

It appears, undisputed, that "there has been credited on this note about $1,250.00 for wool taken from the sheep since they were sold." (Testimony of Sisson, record, page 75. Endorsement on note, record, page 71.)

This fact appeared at the trial, and the $1,250 should not be applied to a dead mortgage; but if the contention of The Northwestern National Bank be true, it should have been applied in reduction of its claim, for its mortgage covered all the wool on the date of the sale, March 31, 1894 (record, page 106), and it was due November 30, 1893. (Record, page 105.)

Moreover, it appears that The Northwestern National Bank duly protested its note, for non-payment, and was entitled to judgment against The Arizona Lumber and Timber Company for the amount of its demand (record, page 78), and was offered judgment against The Arizona Lumber and Timber Company for the amount of its demand (record, page 42), and did not take it.

Objection is made in the brief of appellants that money is divided instead of sheep, but no such point is raised in the errors assigned.

The same objection has been decided against the contention of appellants in:

Oxsheer vs. Watt, supra.
Interstate Galloway Cattle Co. vs. McLain, supra.

There can be no controversy about the one thousand of the original bearing ewes in existence on the day of the decree as to appellee bank, but as we have before contended that independent of substitution this bank's

mortgage extends to and covers the increase as a matter of law.

The only rights appellant, Northwestern National Bank, can possibly have superior to the appellant companies arises from lack of actual notice of the rights of appellee bank, and if it was put upon inquiry then it has no better rights.

We submit that the decree should be affirmed as to appellee bank.

Respectfully,

CASS E. HERRINGTON,
FRED HERRINGTON,

Solicitors for Appellees, B. N. Freeman et al., Copartners as Arizona Central Bank.

NORTHWESTERN BANK *v.* FREEMAN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 18. Argued April 15, 18, 1898. — Decided October 24, 1898.

A description in a chattel mortgage of a given number of articles or animals out of a larger number is not sufficient as to third persons with acquired interests; but such a mortgage is valid against those who know the facts.

Statement of the Case.

A purchaser of personal property, which is mortgaged, is charged with knowledge of every fact shown by the records, and is presumed to know every other fact which an examination, suggested by the records, would have disclosed.

Under the rule that the incident covers the principal, a mortgage of domestic animals covers the increase of such animals, though it be silent as to such increase.

THE appellees recovered judgment in the district court, which was affirmed on appeal to the Supreme Court of the Territory, from which an appeal has been taken to this court.

The facts found by the territorial Supreme Court are as follows:

"On July 10, 1890, Harry Fulton, one of the defendants in the court below, executed an alleged chattel mortgage for $7500, payable in one year, in favor of the Arizona Central Bank, one of the appellees herein and plaintiffs in the court below; that the description in said mortgage of the property purporting to be covered by it is as follows: '1200 lambs, marked — ewes with hole in left ear and split in right; wethers, hole in right ear and split in left ear; 1600 ewes marked hole in left ear and split in right ear; 2200 wethers marked hole in right ear and split in left ear, making 5000 sheep in all with the Fulton brand.'

"That on said day said Fulton executed another alleged mortgage for $4000, payable in ninety days, in favor of John Vories, one of the appellees herein and one of the defendants in the court below; that the description in said alleged mortgage is as follows: 'Wethers and dry ewes to the number of 1000, the wethers marked with a split in the left ear and a hole in the right; ewes marked with a hole in the left ear and a split in the right.'

"That on said day said Fulton owned and possessed 6200 sheep that were herded and run together, and this was all he owned, said sheep being marked as follows: 'Ewes and ewe lambs split in the right ear, hole in the left; wethers and wether lambs reverse;' and both of the said appellees had knowledge of this fact at the time they accepted their alleged mortgages, the one on 5000 head and the other on 1000 head.

200 head not being included in either of said mortgages, all of said sheep having the same mark and running in the same herd, and none of them being capable of identification save only by the ear mark put on them as aforesaid, and that therefore there was no way by which any of said sheep could be distinguished from any of the others.

"That said Fulton continued in the ownership and possession of all of said sheep, save only such as died, were sold by him, consumed or lost, until the 18th of December, 1893. At no time did appellees, or either of them, ever take or ever have possession of said sheep, or any of them, or of the increase thereof, nor were any of said sheep or the increase thereof ever by any one identified, designated or in any way segregated, apportioned or substituted to the or on account of the said pretended mortgages, or of either thereof. From date of said mortgages (July 10, 1890) to January 4, 1893, said Fulton from time to time sold of said sheep as follows: 1700 head, at $3 per head, that were by said Fulton accounted for, and the proceeds of which he deposited with the appellee Arizona Central Bank; that both of said appellees knew of these sales and consented to them.

"On January 4, 1893, said Fulton executed a mortgage for $8885 in favor of Arizona Lumber and Timber Company, one of appellants herein and one of the defendants in the court below, covering, among other property, the following described sheep: 'About 3000 ewes, 1000 wethers, and 2000 lambs, same being all the sheep now owned by mortgagor, and including all wool and increase which may be produced by said sheep marked — ewes, split in right ear, hole in left; wethers reverse.' At the instance of appellees said appellant, Arizona Lumber and Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5000 of above sheep to Arizona Central Bank, and one on 1000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear

to foreclose their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn.

"That to August 30, 1893, $3000 of the amount claimed to be due on the mortgage of January 4, 1893, was paid out of wool proceeds, and that on said day said Fulton, for the purpose of securing a $500 advance, and applying the remainder as a payment on said mortgage of January 4, 1893, executed his promissory negotiable note, payable in 90 days, securing the same by a chattel mortgage for the sum of $6000 to the Arizona Lumber and Timber Company.

"That said mortgage was a conveyance, as a security for the payment of said note, of sheep, the same being in said mortgage described as follows, namely: 'About 3200 ewes, more or less; about 1300 wethers, more or less; about 1400 lambs, more or less, being all the sheep now owned by mortgagor, including all the wool and increase which may be produced by said sheep — marked, ewes and ewe lambs, split in right ear, hole in left; wethers and wether lambs, reverse.'

"That in said last-mentioned mortgage no recital or reference was made in any way, nor in any manner, to the existence of any other mortgage or mortgages whatsoever.

"That on the 29th day of September, 1893, and prior to the maturity of said last-mentioned note of $6000, said appellant Arizona Lumber and Timber Company, representing that said mortgage was a first and prior lien on said described sheep, and by means thereof, sold, assigned, endorsed and delivered said note and mortgage to the Northwestern National Bank, one of the appellants herein and one of the defendants in the court below, said Northwestern National Bank becoming an innocent purchaser for value.

"That on December 18, 1893, said Fulton, being then indebted to Riordan Mercantile Company, one of the appellants herein and a defendant in the court below, in the sum of $810.91, it brought its action in said district court against said Fulton whereby to collect the same, and at the same time caused to be issued out of the clerk's office of said court a writ of attachment, which was then levied on the property following,

namely: 'All the right, title and interest of the defendant Harry Fulton in and to the following-described sheep: 2926 ewes, marked hole in left ear, split in right; 900 wether sheep, marked hole in right ear, split in left ear; 1287 lambs — ewe lambs marked hole in left ear, split in right; wether lambs marked hole in right ear, split in left; 118 rams,' same being all of the sheep then owned by said Fulton.

"That on 16th March, 1894, judgment was rendered in said suit in favor of said plaintiff company and against said Fulton, for said amount, and said attachment lien was foreclosed; that on the 31st day of March, 1894, the sheriff of said county of Coconino, by virtue of and pursuant to said judgment, sold said property and delivered the same to the appellant Riordan Mercantile Company, who then entered into the possession thereof, was so in the possession thereof when this cause was tried in the lower court, and are still in possession thereof.

"That by virtue of said writ of attachment the sheriff attached all the sheep then owned by said Fulton, and that on said day, to wit, on the 18th day of December, 1893, there were of said sheep only 1000 head of ewes remaining out of all the sheep that existed on July 10, 1890, the date of said alleged mortgages to appellees; that the remainder of said ewes, all the male sheep and the lambs, had by that time died, been consumed, sold or lost.

"That subsequent to the making of said alleged mortgages to said appellees, an oral agreement between them and the said Fulton was made that the securities of appellees were to be kept good out of the increase by substitution, the consideration therefor being that said Fulton might sell and dispose of the said sheep without interference from appellees.

"That Sisson, a witness for appellants in this case, is and was during all of said transactions the treasurer of both the Riordan Mercantile Company and the Arizona Lumber and Timber Company, appellants herein, and that these two corporations have practically the same officers.

"That in said district court said Arizona Central Bank brought its suit as plaintiff against said Fulton, Vories, Donahue as sheriff, the Arizona Lumber and Timber Company, the

Statement of the Case.

Riordan Mercantile Company and the Northwestern National Bank, as defendants, asking for a foreclosure of its said alleged mortgage, the same being the above-entitled cause.

"That said action was tried and judgment was rendered foreclosing said alleged mortgages of both of appellees herein and also the said mortgage dated January 4, 1893, of said Arizona Lumber and Timber Company and the mortgage owned by said Northwestern National Bank as aforesaid, in which said judgment said court adjudged that appellees have a prior and first lien on said property, viz., the Arizona Central Bank upon 5000 sheep of the Fulton mark by reason of its said mortgage, and the said Vories on 1000 sheep of the Fulton mark by reason of his said mortgage; and said court decreed and ordered that an order of sale issue for the sale of all of said property to the sheriff of said county, and that the proceeds arising therefrom be divided by the sheriff and applied as follows, namely, at the ratio of five dollars to said Arizona Central Bank and one dollar to said Vories; that in case anything should be left after the payment of said two mortgages to said bank and Vories, the same should be applied to the payment of the judgments of said Northwestern National Bank and said Arizona Lumber and Timber Company and Riordan Mercantile Company in the order named."

There are seventeen assignments of errors, which are somewhat confused. They are grouped and presented by counsel under seven heads as follows:

"First. In the first assignment of error it is set forth that the trial court erred in adjudging, and the territorial Supreme Court erred in affirming said judgment, that the mortgages of the appellees were prior liens on *all* of the sheep owned by defendant Fulton at the time of the execution of said mortgages, even though said mortgages had been good and prior liens on the sheep specified therein.

"Second. In the second, third, fifth and eighth assignments of error it is set forth that the trial court, and the territorial Supreme Court in sustaining its holding, erred in admitting in evidence the mortgages from defendant Fulton

to the appellees, marked Exhibit 'A' and 'B,' against the objections of the appellants; and in overruling motion of appellants to strike out of the evidence the said mortgages; and in holding that said mortgages were valid and subsisting liens on all of said property; and in holding and deciding that the description of said property in appellees' said mortgages was a sufficient description.

"Third. In the fourth and seventh assignments it is set forth that the court erred in admitting, over the objection of the appellants, testimony concerning a conversation between J. H. Hoskins, John Vories, F. W. Sisson and Harry Fulton, and evidence relative to an alleged agreement, and evidence tending to prove a breach of contract between the appellees and appellant Arizona Lumber and Timber Company.

"Fourth. The trial court erred, as set forth in the fifteenth and sixteenth assignments, in adjudging that on the date of its decree herein the mortgage of said appellee bank covered five thousand head of sheep of the Fulton herd and mark, such adjudication attempting to substitute five thousand head of sheep after the making of said two mortgages to appellees; the trial court erred in attempting said substitution and then holding it good as to appellants Riordan Mercantile Company and Northwestern National Bank.

"Fifth. The trial court erred, as set forth in the eleventh assignment, in adjudging that said mortgages of appellees were mere securities for debts, the legal title to said sheep remaining in said Fulton notwithstanding said mortgages and in adjudging that said sheep should be sold and the proceeds paid to said Arizona Central Bank and said Vories, in the proportion of five dollars to the former and one to the latter.

"Sixth. The trial court erred, as set forth in the seventeenth assignment, in adjudging that appellant Northwestern National Bank was bound by said pretended agreement of substitution or was bound by said pretended mortgages of appellees, or that said mortgages were prior liens on said property, or on any of it to the mortgage owned by said appellant.

"Seventh. In the sixth, ninth, tenth, twelfth, thirteenth

and fourteenth assignments it is set forth that the court erred in denying and overruling defendants' motion for a new trial of said cause; and in deciding that the mortgage to said appellee the Arizona Central Bank conveyed five thousand head of sheep, marked: ewes with hole in left ear and split in right, wethers with hole in right ear and split in left ear, and that a thousand more of said sheep were conveyed by mortgage to said appellee Vories, with the same marks; and in adjudging that the property included in the said attachment lien of the said Riordan Mercantile Company and sold and delivered to said company thereunder was the same property that is conveyed, or attempted to be conveyed, by the mortgages of said appellees; and in adjudging that the rights, title and interests obtained by said Riordan Mercantile Company, by virtue of said attachment lien and sale, was subject to the alleged rights of said appellees by virtue of their said pretended mortgages; and in adjudging that appellants Riordan Mercantile Company and Arizona Lumber and Timber Company had actual notice of the property conveyed by the said alleged mortgages of said appellees; and in adjudging that F. W. Sisson, as the treasurer of said Riordan Mercantile Company, agreed with said appellees that the number of sheep in said mortgages of appellees should be kept good out of the increase of said sheep, and that the wool was released by said agreement to said company, and that the consideration thereof was an alleged forbearance to foreclose said mortgages of said appellees."

Mr. A. B. Browne for appellants. *Mr. A. T. Britton* and *Mr. E. E. Ellenwood* were with him on the brief.

Mr. Fred. Herrington for appellees. *Mr. Cass E. Herrington* was with him on the brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The contest is for priority. The territorial Supreme Court awarded it to the mortgages of the appellees. The appellants

contend that this was error because of the fact that the mortgages respectively covered 5000 and 1000 head of sheep, and that Fulton owned 6200 head, and that hence the mortgages were invalid on account of insufficient descriptions. The mortgages do not state that Fulton owned a greater number than those he mortgaged, but the fact is found by the court.

The rule is laid down that, as to third persons who have acquired interests, a description in a mortgage of a given number of articles out of a larger number is not sufficient. Jones on Chattel Mortgages, sec. 56 *et seq.*, and cases cited.

But such a mortgage is valid against those who know the facts. *Cole* v. *Green*, 77 Iowa, 307; *Clapp* v. *Trowbridge*, 74 Iowa, 550.

The mortgage of January 4, 1893, executed by Fulton to the Arizona Lumber and Timber Company was undoubtedly taken by the latter not only with actual notice, but it was expressly made subject to the prior ones to appellees. The finding of the court is: "At the instance of appellees said appellant, Arizona Lumber and Timber Company, permitted the following recital to be inserted in said last-mentioned mortgage, namely: 'This being subject to a mortgage on 5000 of above sheep to Arizona Central Bank, and one on 1000 head, and the residence property to John Vories, said number, as described in mortgages, to be kept good out of increase.' There was consideration for the foregoing recital in the mortgage of January 4, 1893, namely, that the appellees should forbear to foreclose their mortgages, and should release their claim on the wool clip of 1893, the wool at that time not having been shorn."

The court further finds that on August 30, 1893, Fulton paid to the Arizona Lumber and Timber Company $3000 out of the proceeds of the wool from the mortgaged sheep, secured from the company an advance of $500, and for that and the amount due on his note "executed his negotiable promissory note payable in ninety days, securing the same by a chattel mortgage for the sum of $6000." In this mortgage there was no recital or reference to the existence of any other mortgage. On the 29th of September, 1893, and prior to this

maturity, the "appellant, the Arizona Lumber and Timber Company, representing that said mortgage was a first lien, sold, endorsed and delivered the note and mortgage to the appellant, the Northwestern National Bank." It is this note and mortgage that are in controversy and which are claimed as prior liens to the mortgages of appellees. The bank is found to be an innocent purchaser for value. By this is meant that it had no actual notice of the prior mortgages. Did the law impute notice to it? Certainly not by the record of the mortgages to appellees. Did it by the record of the mortgage of January 4, 1893, to the Arizona Lumber and Timber Company? If the bank was charged with notice of that mortgage it was charged with notice of its contents. "Notice of a deed is notice of its whole contents, so far as they affect the transaction in which notice of the deed is acquired." 2 Sch. & Lef. 315, cited and approved in *Boggs* v. *Varner*, 6 Watts & Sergeant, 469, 473.

A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the records would have disclosed. Secs. 710 and 710*a*, Devlin on Deeds, and cases cited. The mortgage of January 4, 1893, to the Arizona Lumber and Timber Company was by the same mortgagor as that of August 30, the one sold to the Northwestern National Bank, and covered the same sheep, and hence, under the rule announced, the bank was charged with notice of it and of its recitals. It was not given up or satisfied. It was preserved as an independent lien.

It was not satisfied, appellants say, because it covered other property beside the sheep. This is an insufficient reason. If the debt it secured was paid, there was no reason for retaining the lien on any property. But whatever the reason, it was retained and affected the title. That is the material circumstance, and not in whose name it stood. It was in the chain of the title and affected it. It would have been found if looked for, and would have notified the bank of the transactions which conducted to it and caused it to be made subject to the mortgages of the appellees. We therefore think the

territorial courts committed no error when they assigned priority to those mortgages. Nor was it error to subordinate the attachment and judgment of the Riordan Mercantile Company to them. That company had, according to the finding of the court, actual notice.

The territorial court found that on the 18th of December, 1893, there were one thousand head of ewes remaining out of all the sheep which existed on July 10, 1890, the date of the mortgages to appellees; that the remainder of the ewes, all of the male sheep, and the lambs had died, been consumed, sold or lost. The findings are absolutely silent as to whether there were or were not other sheep in existence at that time, or at the time the decree was entered. We infer from the briefs of counsel that there were others — the increase of those mortgaged — and there is a contention as to whether these are covered by the lien of the mortgages.

Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase. This court said in *Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S. 69, by Mr. Justice Harlan "according to the maxim *partus sequitur ventrem*, the brood of all tame and domestic animals belong to the owner of the dam or mother." 2 Bl. Com. 390. See also *Pyeatt* v. *Powell*, decided by the Circuit Court of Appeals for the Eighth Circuit, 10 U. S. App. 200, and cases cited.

But whatever was doubtful or disputable in the mortgages of appellees as to the increase was resolved and settled by agreement between all who had interests, and was expressed in the mortgage of January 4, 1893. There is nothing in the record to show a substitution except by the increase, and therefore we are not called upon to pass upon some of the interesting questions argued by appellants. Nor are we embarrassed by considerations of the increase being in or having passed out of the "period of nurture." Such considerations are only important when a subsequent purchaser or mortgagee has taken without notice, actual or constructive, which we have seen the Northwestern National Bank did not.

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The objections to testimony assigned as error in the fourth and seventh assignments of error were not well taken. The testimony showed the transactions and the relations of the parties to them.

Decree affirmed.